Supreme Court, U.S.
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No. _____

In The

United States Supreme Court

SHAFIQ RASUL, ET AL.,
Petitioners,

v.

GEORGE W. BUSH, ET AL.,
Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

JOSEPH MARGULIES
Counsel of Record
Margulies & Richman, plc
2520 Park Avenue, South
Minneapolis, MN 55404
(612) 872-4900

Counsel for Petitioners

BARBARA J. OLSHANSKY
STEVEN MACPHERSON WATT
SHAYANA KADIDAL
MICHAEL RATNER
JEFFREY E. FOGEL
Center for Constitutional Rights
666 Broadway
New York, NY 10012
(212) 614-6430

129 pp

QUESTIONS PRESENTED

Petitioners are citizens of Great Britain and Australia. Seized abroad in apparent connection with the United States' "War on Terrorism," they have been incarcerated in Guantánamo Bay, Cuba, without charges or proof of wrongdoing, and with no opportunity to establish their innocence, for over 18 months. The Government claims it may hold Petitioners under these conditions indefinitely, and that no court has jurisdiction to review the cause for their detention. The courts below agreed.

In this context, the case presents the following questions:

I.

In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court held that enemy aliens who had been convicted by a lawful military commission of violating the laws of war in China, and who had never been under the exclusive control of the United States, could not obtain further review of their convictions in federal court. Did the courts below err in extending *Johnson* to deny Petitioners a judicial forum in which to question the factual basis for their detention or its legality under the Constitution and international law?

II.

Did the courts below err in holding categorically that the Constitution gives "no constitutional rights, under the due process clause or otherwise," to foreign nationals who are subjected to injurious action by the Government of the United States unless they have set foot within territory over which the United States has "ultimate sovereignty" (as distinguished from exclusive jurisdiction and control?).

III.

Does the Due Process clause of the Fifth Amendment permit the United States to detain foreign nationals indefinitely, in

solitary confinement, without charges and without recourse to any legal process, so long as they are held outside the "ultimate sovereignty" of the United States, even when they are held in territory over which the United States has exclusive jurisdiction and control?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The following persons imprisoned at Guantánamo Bay Naval Base appeared below as petitioners: Mamdouh Habib; Shafiq Rasul; Asif Iqbal; and David Hicks. The following individuals, who are family members of the detainees listed above, also appeared below as next friend petitioners: Maha Habib, the wife of Mamdouh Habib; Skina Bibi, the mother of Shafiq Rasul; Mohammed Iqbal, the father of Asif Iqbal; and Terry Hicks, the father of David Hicks.

The following persons appeared below as respondents: George W. Bush, President of the United States; Donald H. Rumsfeld, Secretary of Defense: Brigadier General Michael Lehnert, Commander of Joint Task Force-160; Brigadier General Rick Baccus, Commander of Joint Task Force-160; Colonel Terry Carrico, Commander of Camp X-Ray, Guantánamo Bay, Cuba; and Lieutenant Colonel William Cline, Commander of Camp Delta, Guantánamo Bay, Cuba.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Shafiq Rasul, *et al.*, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), and is reprinted in Appendix A to this petition. The orders denying the petitions for reconsideration and rehearing *en banc* are unreported, and are reprinted in Appendix B. The opinion of the United States District Court for the District of Columbia is reported as *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), and is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The judgment of the D.C. Circuit Court of Appeals was entered on March 11, 2003. Timely petitions for reconsideration and rehearing *en banc* were denied on June 2, 2003. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution (67a), as well as 28 U.S.C. § 2241 (68a); Geneva Convention III, Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Article 5, 6 U.S.T. 3316, 75 U.N.T.S 135 (69a-70a); and U.S. Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees, Chapter 1-6, Tribunals, Applicable to the Departments of the Army, the Navy, the Air Force, and the Marine Corps, (October 1,

1997) (71a-74a).[1]

STATEMENT OF THE CASE

A. Statement of Facts

Seized in apparent connection with the "War on Terrorism," Petitioners are in United States custody in Guantánamo Bay, Cuba. They have never been charged, and have no recourse to any legal process. Apart from censored letters from their families, they have been held *incommunicado* for approximately 18 months. The United States has presented no evidence to justify the detentions under either military or civilian law, and claims it is under no obligation to do so. It also claims it may hold Petitioners under these conditions indefinitely, and the Court of Appeals agreed.

i. The Petitioners

Shafiq Rasul and Asif Iqbal are British citizens; Mamdouh Habib and David Hicks are Australian. R. Pet. ¶1; H.Pet. ¶1.[2] After September 11, 2001, Petitioner Rasul traveled from his home in Britain to visit relatives in Pakistan. While overseas, he wanted to explore his culture and continue his computer studies. He was seized in Pakistan after visiting with his aunt. R. Pet. ¶24. Petitioner Iqbal also traveled to Pakistan from his home in Britain after

[1] Petitioners withdraw any reliance on the Alien Tort Claims Act, 28 U.S.C. §1350.

[2] "R. Pet." refers to the First Amended Petition for Writ of Habeas Corpus, filed in the D.C. District Court on March 18, 2002, on behalf of Petitioners Rasul, Iqbal and Hicks and their respective next friends. *Rasul et al. v. Bush, et al.*, No. 02cv00299 (D.D.C.). "H. Pet." refers to the Petition for Writ of Habeas Corpus and Request for Adequate Process, filed on June 10, 2002, on behalf of Petitioner Mamdouh Habib and his next friend. *Habib et al. v. Bush, et al.*, No. 02cv01130 (D.D.C.). As described in the text, *infra*, the lower court accepted Petitioners' allegations as true and dismissed the cases for lack of jurisdiction. (38a)

September 11, intending to marry a woman from his father's small village. He was seized in Pakistan shortly before the marriage. *Id.* at ¶23. Both men were ultimately detained by the Northern Alliance or other forces and turned over to the United States in December 2001. In January 2002, they were transported to Guantánamo Bay, where they have been held ever since. *Id.* at ¶¶11,15, 28.

Petitioner Habib traveled to Pakistan from his home in Australia in August 2001, to look for work and a school for his teenage children. On October 5, 2001, he was seized by Pakistani authorities, who turned him over to Egyptian authorities. Early in 2002, Egypt transferred Mr. Habib to U.S. custody, and on May 4, 2002, he was transported to Guantánamo Bay. H. Pet. ¶¶16-19. Petitioner Hicks was living in Afghanistan at the time of his seizure by the Northern Alliance, which transferred him to United States custody in December 2001. Hicks' father believes his son may have joined the army of the then-incumbent government of Afghanistan, the Taliban. R. Pet. ¶¶22, 27; R. Pet. Ex. C, Att. 8. Petitioner Hicks has been held at Guantánamo Bay since January 2002. *Id.* at ¶¶7-8.

The four Petitioners are not, nor have they ever been, enemy aliens or unlawful combatants. Prior to their detention, the Taliban had caused no American casualties, and Petitioners neither caused nor attempted to cause harm to American personnel. Likewise, the four Petitioners have never been members of or received training from Al Qaida or any other terrorist organization. They had no involvement, direct or indirect, in the terrorist attacks of September 11, 2001, or in any other terrorist act. They maintain today, as they have throughout this litigation, that they are innocent of any wrongdoing. The United States has never presented evidence to the contrary. R. Pet. ¶¶22-31; H. Pet. ¶¶15, 23.

All four Petitioners promptly identified themselves to the United States by their correct names and nationalities. They were allowed to write a letter to their respective families, which the International Committee of the Red Cross (ICRC) delivered. When their families learned that Petitioners were in custody, they contacted attorneys. The attorneys and family members for all four Petitioners have repeatedly implored the United States to provide information regarding their welfare, and to let them speak with Petitioners. These entreaties have gone unanswered. Apart from sporadic, censored mail from their families, Petitioners have had no contact with the outside world. R. Pet. ¶¶7-17, 48-49; H. Pet. ¶¶5, 10, 45. They do not even know they are the subject of this litigation.

Within the prison, Government agents have repeatedly interrogated all four Petitioners. Petitioners have not been charged, they have not appeared before any military or civilian tribunal, and they have not been provided counsel. Not only have Petitioners *not* been informed of their rights under domestic or international law, the Government contends they should *not* be so informed. The Government also claims that Petitioners are not entitled to the protections of the Geneva Conventions. R. Pet. ¶47; H. Pet. ¶44.[3] At the

[3] In the lower courts, the Government insisted that the Petitioners were not being held pursuant to the President's order concerning the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." 66 Fed. Reg. 57,831. Instead, they were held pursuant to the "President's authority as Commander in Chief and under the laws and usages of war." *Rasul v. Bush*, Gov't. Motion to Dismiss at 8. On July 3, 2003, the President designated six detainees as subject to the order. According to the Government, this means these detainees *may*, but need not, be brought before a military commission. Department of Defense News Transcript, *Background Briefing on Military Commissions*, July 3, 2003, available at http://www.dod.mil/transcripts/2003/tr20030703-0323.html. Though the Government has not identified the detainees that have been designated, media reports indicate that Petitioner David Hicks is among them. *See e.g.*, *Anger as Britons Named for U.S. Terror Trials*, WASH. POST, July 4,

same time, Government officials have acknowledged that at least some of the detainees on Guantánamo were victims of circumstance and are probably innocent. H. Pet. ¶46; Katharine Q. Seelye, *A Nation Challenged: Captives; An Uneasy Routine at Cuba Prison Camp*, N.Y. TIMES, Mar. 16, 2002)(quoting Deputy Commander at Guantánamo).

ii. The Prison

A veil of secrecy surrounds the prison and its inmates. The Government has never publicly acknowledged that Petitioners are being held in Guantánamo, although the British and Australian Governments have confirmed that each of the Petitioners is incarcerated on the base. Indeed, the Government has never disclosed information regarding any particular detainee, including the circumstances of his seizure, what the Government believes he may have done to justify his continued detention, or his current welfare.

The Government has, however, "allowed tightly controlled media visits." Charles Savage, *For Detainees At Guantánamo, Daily Benefits – and Uncertainty*, MIAMI HERALD, Aug. 24, 2003. According to recent reports, Camp Delta consists of four units. The majority of the inmates are held in three camps described by the Government as maximum-security facilities. Inmates are in solitary confinement, restricted to their 6'8" by 8' cells twenty-four hours per day, except for 30 minutes' exercise three times per week, followed by a five minute shower. *Id.* The inmates are shackled while outside their cells, and exercise on a "caged 25-foot by 30-foot concrete slab." *Id.* "Lights are kept on 24 hours a day, and guards pace the rows constantly. Inside each cell, detainees have a hole-in-the-ground toilet, a sink with running water low enough to make washing feet

2003. If the United States begins proceedings against Mr. Hicks, it is possible his case would no longer raise the same issues as the remaining Petitioners (who have not been designated). At this point, however, Mr. Hicks remains subject to indefinite detention without legal process.

for prayers easy, and an elevated shelf-bunk with a mattress." *Id.*

The prison currently holds approximately 660 inmates from 42 countries. *Suspect at Guantánamo Attempts Suicide*, ASSOC. PRESS, Aug. 26, 2003. Though some inmates have been released in the past 18 months, others have replaced them, and for the past year, the prison has maintained approximately the same number of inmates. *See e.g., Tales of Despair From Guantánamo*, N.Y. TIMES, June 17, 2003. Further, the Government recently confirmed that the prison is expanding. A fifth unit, adding 24,000 square feet, will be finished mid-2004. According to the prison commander, the new construction signals the Government's commitment to rely on the prison "as long as the global war on terrorism is ongoing...." Charles Savage, *Growth at Base Shows Firm Stand on Military Detention*, MIAMI HERALD, Aug. 24, 2003 (quoting prison commander Maj. Gen. Geoffrey Miller). The expansion increases capacity by ten percent and will "enlarge[] [the] ability to do interrogations." When this new phase is completed, the prison will have capacity for 1,100 inmates. *Id.*

The Government acknowledges that indefinite detention is taking its toll on the inmates. Since the prison opened, there have been 32 attempted suicides. *Suspect at Guantánamo Attempts Suicide*, ASSOC. PRESS Aug. 26, 2003. Most attempts, including three in the past ten days, have occurred this year, which prison officials attribute "to the effects of the indefinite detentions on prisoner morale." *Guantánamo Suicide Attempts Rise to 31*, ASSOC. PRESS Aug. 21, 2003. As of last year, 57 prisoners were being treated for mental illnesses, and many were taking antidepressants or anti-psychotic medication. Katherine Q. Seelye, *Guantánamo Bay Faces Sentence of Life as Permanent U.S. Prison*, N.Y. TIMES, Sept. 16, 2002 (quoting prison hospital director Capt. Albert Shimkus).

iii. Guantánamo Bay

Since 1903, the naval base at Guantánamo Bay has been under the exclusive jurisdiction and control of the United States. The Government occupies Guantánamo Bay pursuant to a lease that grants the United States "complete jurisdiction and control," while Cuba retains "ultimate sovereignty." Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, 23 Feb. 1903, art. III, T.S. No. 418. (14a) These terms are not defined in the lease. The lease term is indefinite. *Id.*

Guantánamo is a self-sufficient and fully American enclave, larger than Manhattan, with thousands of military and civilian residents who enjoy the trappings of a small American city. The base operates its own schools, power system, water supply, and internal transportation system. Congress has repeatedly extended federal statutes to the base. Gerald L. Neuman, *Surveying Law and Borders: Anomalous Zones*, 48 STAN. L. REV. 1197, 1198 (1996).

B. Basis for Federal Jurisdiction In the Court Below

Through their next friends, Petitioners Rasul, Iqbal and Hicks filed a First Amended Petition for Writ of Habeas Corpus on March 18, 2002. The Petitioners alleged that prolonged and potentially indefinite detention in Guantánamo violated the Due Process clause of the Fifth Amendment, as well as other provisions of domestic and international law. R. Pet. ¶¶51-64. They requested, *inter alia*, an evidentiary hearing to the extent Respondents contested the facts; a declaratory judgment that the current detention is unlawful; an order permitting them to confer privately with counsel; and release from unlawful custody.

On March 18, 2002, the Government moved to dismiss the First Amended Petition on various grounds, including lack of jurisdiction. On May 1, 2002, while the Government's motion was pending, twelve Kuwaiti

prisoners on the base, through their next friends, filed *Al Odah v. United States*, No. 02cv00828 (D.D.C.), as a related case. The Government moved to dismiss that suit as well, and the cases were consolidated for the consideration of the motions to dismiss. On June 10, 2002, Petitioner Habib, through his next friend, filed a Petition for Writ of Habeas Corpus in *Habib v. Bush*, No. 02cv01130 (D.D.C.), raising the same violations and seeking the same relief as Petitioners in *Rasul*, except that Habib requested release from unlawful custody "unless respondents commence a legally sufficient process adequate to establish the legality of his continued detention." H. Pet. ¶15.

On July 30, 2002, the district court dismissed *Rasul* and *Al Odah* for lack of subject matter jurisdiction. (34a) On August 8, 2002, the court dismissed *Habib*. (65a) All parties filed timely appeals to the D.C. Circuit, which consolidated *Habib* and *Rasul* and heard argument in all cases on December 2, 2002.

The D.C. Circuit affirmed the dismissals on March 11, 2003, holding that Petitioners have no enforceable rights, "under the due process clause or otherwise." (12a) The "consequence" of this conclusion, the Court held, is that "no court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. §2241, to the Guantánamo detainees...". *Id.* The court then denied the timely requests for reconsideration and rehearing *en banc* on June 2, 2003. (30a-31a)

Because the lower courts held that there is no jurisdiction to entertain a writ of habeas corpus, there has been no occasion in this litigation to discuss what process Petitioners would enjoy under either the Due Process clause or international law.

REASONS FOR GRANTING THE WRIT

THE LOWER COURT IMPROPERLY EXTENDED *JOHNSON v. EISENTRAGER* TO ALLIED NATIONALS IMPRISONED WITHOUT LEGAL PROCESS IN AN AREA SUBJECT TO EXCLUSIVE UNITED STATES JURISDICTION AND CONTROL

The United States has created a prison on Guantánamo Bay that operates entirely outside the law. Within the walls of this prison, foreign nationals may be held indefinitely, without charges or evidence of wrongdoing, without access to family, friends or legal counsel, and with no opportunity to establish their innocence. The Government claims that no court in the country has jurisdiction to review the cause for their detention, and the lower courts agreed.

So framed, this case presents questions of surpassing importance: whether the United States Government is constrained by the Constitution and international law in its treatment of foreign nationals imprisoned outside the "ultimate sovereignty" of the United States, and if so, whether foreign nationals may enforce those constraints in a federal court.

The Court of Appeals held that the Government is free to act without legal restriction because these prisoners enjoy no enforceable rights, "under the due process clause or otherwise," so long as they have not set foot within the "ultimate sovereignty" of the United States. Though the United States has held Petitioners without legal process for approximately 18 months, far from any theater of military operations and in an area over which the United States exercises exclusive jurisdiction and control, the lower court held they have no rights that may be vindicated in federal court.

In reaching its conclusion, the lower court dramatically extended *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In *Johnson*, the Court held that German war criminals convicted and sentenced by a lawful military commission for violating the laws of war in China could not seek habeas relief in the federal courts. But this case differs from *Johnson* in three fundamental respects.

First, the petitioners in *Johnson* were convicted war criminals. A lawful military commission had convicted them of violating the laws of war by assisting the Japanese after Germany's surrender, and they did not complain that the commission's procedures had denied them due process. The Petitioners in the present case, by contrast, are imprisoned completely without legal process. It is one thing to hold that war criminals – tried, convicted, and sentenced by a lawful commission – whose procedural protections are not the subject of complaint cannot seek further review in a civilian court. It is quite another to extend that holding to people who have never been charged or afforded any process.

Second, the prisoners in *Johnson* were enemy aliens – that is, they were the citizens of a nation at war with the United States. The Court emphasized repeatedly in *Johnson* that enemy aliens suffer restrictions that are not visited upon aliens of friendly allegiance. The Petitioners in the present case are citizens of our closest allies, Great Britain and Australia.

And third, Guantánamo Bay is not wartime China. It is a fully American enclave under the exclusive jurisdiction and continuous control of the United States Government. Unlike China, the quality and character of the control exercised by the United States in Guantánamo Bay is no less comprehensive than that exercised in the insular territories, and is entirely sufficient to justify federal jurisdiction.

Extending *Johnson* to Petitioners here has three immediate and significant consequences. First, it has brought the D.C. Circuit into conflict with this Court. The decision below is not only inconsistent with *Johnson*, but with this Court's due process jurisprudence. The Court has held that due process is violated when an American state court exerts *in personam* jurisdiction over nonresident foreign nationals who have not voluntarily established certain minimum contacts with this country. Such a holding would be not merely wrong but inconceivable if, as the D.C. Circuit held below, the very *absence* of such minimum contacts deprived nonresident foreign nationals of any right to invoke due process protection in the first place. Second, the decision below has brought the D.C. Circuit into conflict with the many other courts of appeals that have extended fundamental constitutional rights to foreign nationals in territory that is outside the "ultimate sovereignty" of the United States but within its exclusive jurisdiction and control.

But the third consequence of the lower court opinion is perhaps the most important. The lower court has sanctioned the creation of a prison wholly outside of the law. Though the United States relies on *Johnson*, it has pointedly refused to heed the Court's admonition that the prisoners were entitled to the protections of the Geneva Convention. *Johnson*, 339 U.S. at 789, n. 14. Indeed, to the contrary, the Government here claims that Petitioners do not enjoy *any* substantive protections as a matter of right, but only as a matter of convenience, and only to the extent permitted by the United States. The Government claims it will apply "the principles" of the Third Geneva Convention "to the extent appropriate and consistent with military necessity." Office of the Press Secretary, Fact Sheet, Status of Detainees at Guantánamo, Feb. 7, 2002, at 1 (www.whitehouse.gov/news/releases/2002/02/20020207-13.html). Despite its statement committing to adherence to the principles of international humanitarian law, however, the Government has therefore

decided that the Third Geneva Convention does not apply either to Al Qaida or Taliban detainees, thereby denying them even the possibility of receiving the process and protections due prisoners of war. It made the decision without holding the independent and impartial tribunals mandated by the Third Geneva Convention, U.S. military regulations which implement Article 5 of that Convention, and international and human rights law generally. Petitioners are thus held in a law-free zone, possessing only those substantive rights under military or civilian law that the Government deigns to extend. Two centuries ago, this Court recognized "the government of the United States as ... a government of law and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803). *Johnson* certainly does not authorize the Executive Branch to imprison Petitioners indefinitely at its sole discretion without any legal process or justification for its actions. The Government's disdain for the principles of justice and the rule of law is unprecedented in our history.

The United States now holds nearly 700 inmates at Guantánamo Bay. Most live in solitary confinement, restricted to 6' by 8'cells for more than 23 hours a day.[4] According to the Pentagon, there have been 32 attempted suicides since the prison opened in January 2002, with most taking place this year.[5] With no legal process, no opportunity to establish their innocence, no human contact with the outside world except censored letters transmitted through the

[4] Amnesty International, *USA: The Threat of A Bad Example*, AI Index AMR 51/114/2003, Aug. 2003 at 17, available at http://web.amnesty.org/library/Index/ENGAMR51114203.

[5] *Suspect at Guantánamo Attempts Suicide*, ASSOC. PRESS, Aug. 26, 2003; *see also Guantánamo Suicide Attempts Rise to 31*, ASSOC. PRESS, Aug. 21, 2003 (quoting Pentagon)("Most attempts occurred this year, which officials and critics alike have attributed to the effects of the indefinite detentions on prisoner morale.").

ICRC, and no apparent end to their incarceration, the prisoners "drift[] through life rather than live[], the prey of aimless days and sterile memories." ALBERT CAMUS, THE PLAGUE 66 (Modern Library ed.) (1948). Indeed, the Petitioners in this case are not even aware of the litigation.

Yet because they have been deemed outside the jurisdiction of an American court, Petitioners' circumstances may not only continue indefinitely, they may deteriorate: the United States may beat prisoners, as it has apparently done at other facilities,[6] or it may transfer them to other countries where beatings are commonplace.[7] Or it may simply forget them, in the vain hope the world will as well.

A. The Decision Below Misreads *Johnson*

The lower court held that foreign nationals outside United States sovereignty have no constitutional rights that may be vindicated in federal court, regardless of their circumstances. (12a) Pressing this crabbed view of the Constitution into service for the jurisdictional question, the lower court also held that because the prisoners have no enforceable rights, they may not bring their claim to federal court. (13a) This holding, however, cannot be squared with *Johnson v. Eisentrager*, 339 U.S. 763 (1950), *Reid v. Covert*, 354 U.S. 1, 67 (1957)(Harlan, J., concurring), or *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

[6] Two prisoners in U.S. custody at Bagram Air Force Base died of "blunt force injuries" in December, 2002. Military coroners ruled both deaths to be homicides, and a spokesman for the U.S. forces said the men had been "beaten." *See, e.g., U.S. Military Investigating Death of Afghan in Custody*, N.Y. TIMES, Mar. 15, 2003 (quoting military spokesman).

[7] *U.S. Decries Abuse But Defends Interrogations*, WASH. POST, Dec. 26, 2002 (quoting a Government official directly involved in "rendering" detainees to other countries: "We don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.").

As noted, the Petitioners in this case differ from the prisoners in *Johnson* in three respects: they have been held approximately 18 months without legal process; they are citizens of our allies; and they are held at Guantánamo Bay, an area subject to the exclusive jurisdiction and control of the United States.

i. *Johnson* Does Not Countenance Indefinite Detention Without Even The Most Rudimentary Process

Unlike Petitioners, the prisoners seeking habeas relief in *Johnson* were convicted war criminals. In their trial before the military commission, the prisoners in *Johnson* enjoyed the rights to notice of the charges against them, to prompt appointment of counsel of choice, to prepare a defense, to call and confront witnesses, to compulsory process, to discover and introduce evidence, to make an opening statement and closing argument, and to appeal their conviction to a military panel. *Johnson v. Eisentrager*, 339 U.S. 763 (1950)(Case No. 306)(Index to Pleadings Filed in Supreme Court, Respondents' Exhibit F at 37-40 (Regulations Governing the Trial of War Criminals).

The commission found 21 of the 27 defendants guilty of war crimes "by engaging in, permitting or ordering continued military activity against the United States after surrender of Germany and before surrender of Japan." 339 U.S. at 765. After their military appeal, the convicted prisoners sought post-conviction relief in the civilian courts, citing unspecified violations of the Fifth Amendment and other provisions of the Constitution and the 1929 Geneva Convention. *Id.* at 767.[8] Given the procedural protections

[8] While *Johnson* involved the 1929 *Convention Relating to the Treatment of Prisoners of War* (July 27, 1929, 47 Stat. 2021) the present case involves the 1949 Convention (*Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S 135), which guarantees prisoners certain due process rights, including fair trial rights

that these inmates enjoyed, it is not surprising that they *did not* raise a challenge under the Due Process clause. *Id.* at 785; *see also Johnson v. Eisentrager*, 339 U.S. 763(1950) (Case No. 306) (Index to Pleadings Filed in Supreme Court, Petition for Writ of Habeas Corpus at 8).

The Court had previously upheld the use of military commissions. *In re Yamashita*, 327 U.S. 1, 7-8 (1946). In addition, the Court had held in *Yamashita* that it would not look behind the commission's verdict to consider the petitioners' guilt, a position the Court reaffirmed in *Johnson*. 339 U.S. at 786-88. As a matter of law, therefore, the petitioners in *Johnson* reached the Court as war criminals who had actively engaged in the service of a hostile state, and who had received the benefit of a lawful trial, the procedures of which complied in all respects with the procedural protections afforded by the 1929 Convention. *Id.* at 778.[9]

The Court granted *certiorari* in *Johnson* to decide "whether the District Court for the District of Columbia has jurisdiction to issue writs of habeas corpus on behalf of enemy aliens confined in Germany by officers of the United States Army to enforce the sentence of an American military

for prisoners accused of war crimes and a right to an independent determination as to status by a competent tribunal for all captives, which were not included in the predecessor Convention.

[9] The procedural history is significant: in their first application for relief, the *Johnson* petitioners admitted they were enemy aliens "in the service of German armed forces in China." *Johnson*, 339 U.S. at 765. They later amended their petition, however, to allege "that their employment [in China] was by civilian agencies of the German Government." *Id.* The Court found this distinction "immaterial" because "[t]hese prisoners have been convicted of violating laws of war" by assisting Japan after Germany's surrender. *Id.* Had there been no trial, the petitioners would have received the benefit of their well-pleaded allegations. There was "no fiction about their enmity," therefore, *only because they had been tried and convicted*. *Id.*

commission imposed after trial and conviction for violations of the laws of war." *Johnson v. Eisentrager*, Case No. 306, Brief for Petitioner at 2. The Court interpreted the Fifth Amendment claim as amounting "to a right not to be tried at all." 339 U.S. at 782. The question for the Court, therefore, was whether war criminals had a Fifth Amendment right to be free from the requirement of a lawful military trial. Answering this question in the negative, the Court held "that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy in the hostile service of a government at war with the United States." *Id.* at 785. In short, *Johnson* deals with the constitutional rights of war criminals who had received a lawful trial.

Seven years after *Johnson*, the Court decided *Reid v. Covert*, 354 U.S. 1 (1957). In his oft-quoted concurrence, which provided the most narrow ground for decision by the Court, Justice Harlan emphasized what was apparently lost on the lower court here: the application of the Constitution overseas cannot be reduced to categorical pronouncements, and depends entirely on the process 'due' in a particular case:

> The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place. ... [T]he question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case.

Reid, 354 U.S. at 74-75 (Harlan, J., concurring)(emphasis in original). More than thirty years later, the Court quoted this language with approval in a case involving a non-resident

alien. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990); *id.* at 277-78 (Kennedy, J., concurring).[10]

Viewing *Johnson* through the lens of Justice Harlan's concurrence, it is apparent the Court sensibly concluded in *Johnson* that war criminals tried, convicted, and sentenced by a lawful commission, whose procedural protections were not the subject of complaint, were not 'due' any additional process in a civilian court; certainly they could not claim a Fifth Amendment right to be free from military trial.

But the present case stands on entirely different footing. The Petitioners have been held for approximately 18 months without legal process. Because there have been no proceedings, they do not complain about an overseas trial by a presumptively competent tribunal, and they do not seek

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[10] In *Verdugo*, the Court held that the warrant clause of the Fourth Amendment does not apply to the search of a foreign national in Mexico, by Mexican agents. *Dicta* in the case cited *Johnson* for the "emphatic" rejection of the "extraterritorial application of the Fifth Amendment." 494 U.S. at 269 (1990). But this language cannot be read in isolation. Immediately prior to the discussion of *Johnson*, the *Verdugo* Court cited the *Insular Cases*. These cases held that fundamental constitutional rights, including Fifth Amendment rights, apply to citizens and aliens alike in "territories ultimately governed by Congress." *See, e.g., Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922)(it is the locality that is determinative of the application of the Constitution..., and not the status of the people who live in it."). The *Verdugo* Court then approvingly quoted the passage from Justice Harlan's *Reid* concurrence insisting that the extra-territorial reach of the Constitution depended on what process was due in a particular case. Although *Reid* had involved the application of the Fifth Amendment to a U.S. citizen overseas, the Court in *Verdugo* did not hesitate to endorse Justice Harlan's guiding principle in the context of a case involving a foreign national. It is thus incorrect to read *Verdugo* as establishing a categorical rule that the Fifth Amendment cannot apply to an alien overseas, without regard to his or her circumstances. Indeed, Justice Kennedy's concurring opinion in *Verdugo* made explicit that the Court had not yet resolved the Constitution's extra-territorial reach "when the Government acts, in reference to an alien, within its sphere of foreign operations." 494 U.S. at 277.

post-conviction relief. Instead, they challenge the fact that they have been cast into a legal limbo, held by the United States without charges, without recourse to any legal process, and with no opportunity to establish their innocence. They seek the core protection of the Great Writ, and nothing in *Johnson* sanctions the holding that a court is powerless to give it to them.[11]

ii. *Johnson* Does Not Confuse All Foreign Nationals With Enemy Aliens

Petitioners' case is distinguishable from *Johnson* in a second respect as well. The prisoners in *Johnson* were "enemy aliens" – a term used to describe them nearly twenty times in the *Johnson* opinion. They were citizens of a nation at war with the United States; and so, even if they had not enjoyed a lawful trial, their status alone subjected them to significant restraints on their liberty.

As the Court explained, while aliens ordinarily enjoy substantial constitutional protection, "[i]t is war that exposes the relative vulnerability of the alien's status." *Johnson*, 339 U.S. at 771. The Court was emphatic that aliens' "vulnerability" was caused by "war," and not, as the lower court here held, by their location outside the United States. Once the United States has declared war, enemy aliens suffer dramatic restrictions on their right to seek relief in the courts, at least when compared to "aliens of friendly allegiance." *Id.* It is their formal status *as* an enemy that works to their detriment.

More recent readers share the view that *Johnson* concerned the rights of enemy aliens, rather than aliens generally. *See, e.g., United States v. Verdugo-Urquidez*, 494

[11] "At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

U.S. 259, 291 (1990) (Brennan, Marshall, JJ., dissenting on other grounds) (*Johnson* "rejected the German nationals' efforts to obtain writs of habeas corpus not because they were foreign nationals, but because they were enemy soldiers."); *Zadvydas v. Davis*, 533 U.S. 678, 704 (2001) (Scalia, J., dissenting on other grounds)(*Johnson* dealt "with the military's detention of enemy aliens outside the territorial jurisdiction."); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1306 n.174 (2002)(*Johnson* should be limited to "enemies in a declared war."). And the present Petitioners are, of course, citizens of nations allied with the United States who neither fought with nor owed allegiance to a nation at war with the United States.

iii. *Johnson* Does Not Contemplate That Territory Within The Exclusive Jurisdiction And Control Of The U.S. Government Can Be Put Beyond The Reach Of Due Process And Judicial Competence

In addition, the prisoners in *Johnson* were tried in China and later repatriated to Germany. The Court in *Johnson* repeatedly noted their lack of connection to this country's "territorial jurisdiction." *See, e.g., Johnson*, 339 U.S. at 768 ("We are cited to no instance where a court...has issued [the writ] on behalf of an alien enemy who, at no relevant time and at no stage of his captivity, has been within its territorial jurisdiction."); *id.* at 771 ("[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."); *id.* at 781 (criticizing lower court for dispensing with "all requirement of territorial jurisdiction.").

The Court also observed that the petitioners had not come within United States sovereignty. *Id.* at 778. But at no

time did the Court establish this as essential to the result.[12] Seizing on this passage, the D.C. Circuit here held that Guantánamo Bay, at least for these purposes, is not different from wartime China because the lease governing the base grants Cuba "ultimate sovereignty" over the territory. (14a) To suggest that Guantánamo Bay is no more a part of the United States than wartime China simply defies reality.

The Executive Branch has long considered Guantánamo Bay to be "practically...a part of the Government of the United States." 25 Op. Att'y Gen. 157 (1904). Solicitor General Olsen once described the base as part of our "territorial jurisdiction" and "under exclusive United States jurisdiction." 6 Op. O.L.C. 236, 242; (1982) (opinion of Asst. Attorney General Olsen). This is confirmed both in theory and in practice.

Larger than Manhattan and nearly half the size of the District of Colombia, the base is entirely self-sufficient. It generates its own power, has its own schools, provides its own internal transportation, and supplies its own water. *See* Neuman, *Anomalous Zones*, 48 STAN L. REV. at 1198. Nearly 7,000 people, including soldiers and civilians, American and alien, live on the base under U.S. authority. *Id.* Crimes committed on the base are prosecuted in Virginia, where defendants, including foreign nationals, enjoy the full panoply of constitutional rights. *See* 18 U.S.C. § 7(3); *United States v. Lee*, 906 F.2d 117, 117 (4th Cir. 1990) (Jamaican national). The Government controls all

[12] The *Johnson* dissenters certainly did not believe the holding depended on whether the petitioners had set foot within the sovereignty of the United States. The dissent never uses the word 'sovereignty' and criticizes the majority for making "territorial jurisdiction" the *sine qua non* of jurisdiction. 339 U.S. at 796 (Black, J., dissenting) ("a majority may hereafter find citizenship a sufficient substitute for territorial jurisdiction...").

entry to the base, and no one may enter or leave without approval from the United States.

The United States exercises this control under an unusual lease that gives Cuba "ultimate sovereignty" over the base, while the United States has always exercised "complete jurisdiction and control." Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16-23, 1903, art. III, T.S. No. 418, 6 Bevans 1113. This language is not defined in the lease. The lease runs indefinitely, and cannot be terminated without the consent of the United States, which has repeatedly declared its intention to remain indefinitely. Neuman, *Anomalous Zones*, 48 STAN L. REV. at 1198.

We alone exercise power at Guantánamo Bay and refuse to recognize the authority of any international tribunal or foreign court. In 2002, the Inter-American Commission on Human Rights of the Organization of American States, of which the United States is a member, ruled that the Guantánamo prisoners may not be held "entirely at the unfettered discretion of the United States government" and that the United States must convene competent tribunals to determine the legal status of the prisoners under its control. Decision on Request for Precautionary Measures (Detainees at Guantánamo Bay, Cuba), Inter-Am.C.H.R. (Mar. 12, 2002), reprinted in 41 I.L.M. 532, 533 (2002). The United States maintains that the decisions of the Commission are not binding upon it and has not complied with the request. It also refuses to recognize the authority of the Cuban government within Guantánamo Bay.[13]

[13] The United States has also rejected the view of the United Nations High Commissioner for Human Rights, the United Nations Working Group on Arbitrary Detention, the European Parliament, and the Parliamentary Assembly of the Council of Europe, all of whom disagree with the Government's position on Guantánamo. *See* Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida

Thus, as Professor Neuman has aptly observed, the United States in Guantánamo exercises "the powers of sovereignty while nominal sovereignty lay elsewhere." Neuman, *Anomalous Zones*, 48 STAN L. REV. at 1228. On the base, the United States enjoys "the basic attributes of full territorial sovereignty," *Duro v. Reina*, 495 U.S. 676, 685 (1990), including unfettered authority, indefinite control, and "the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens." *Id.* To that end, Congress has repeatedly exercised its prerogative to extend federal statutes to Guantánamo. *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 389 (1948).[14]

The extent of our jurisdiction and control in Guantánamo Bay stands in stark contrast to the situation in wartime China. In *Johnson*, the United States could not convene a

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Prisoners at U.S. Base in Guantánamo Bay, Cuba, 16 Jan. 2002 (App. I); Report on the Working Group on Arbitrary Detention, U.N. GAOR, Hum. Rts. Comm., 59th Sess., U.N. Doc. E/CN.4/2003/8 at 19-21, Dec. 16, 2002 (App. J); European Parliament Resolution on the European Union's Rights, Priorities and Recommendations for the 59th Session of the U.N. Commission on Human Rights in Geneva (Mar. 17 – Apr. 25, 2003) available at http://europa.eu.int/abc/doc/off/bull/en/200301/p102001.htm; Parliamentary Assembly Resolution No. 1340 (2003)(Adopted June 26, 2003) available at http://assembly.coe.int/Documents/AdoptedText/ta03/ERES1340.htm.

The Government's position that the prisoners occupy a law-free zone recently prompted the English Court of Appeal to conclude that the prisoners were in a "legal black hole." *Abbasi v. Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598. The Court noted its "deep concern that, in apparent contravention of fundamental principles of law, [the prisoners] may be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of [their] detention before any court or tribunal." *Id.* at ¶66.

[14] Of course, nothing in the present litigation implies habeas jurisdiction over Bagram Air Force Base in Afghanistan or other bases in the theater of military operations.

military commission to try the petitioners unless it first secured permission from the Chinese Government. *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (Case No. 306) (Index to Pleadings Filed in Supreme Court, Respondents' Exhibit 4 at 49, Message of 6 July 1946 to Wedemeyer from Joint Chiefs of Staff).[15] Unlike in Guantánamo Bay, the United States exercised only temporary and shared control over prisoners held in wartime China, and solely as a consequence of the exigencies of wartime operations.[16]

Yet despite the fact that Petitioners are citizens of countries allied with the United States, and have been imprisoned without legal process in an area subject to the exclusive jurisdiction and control of the United States, the D.C. Circuit held that, like the prisoners in *Johnson*, they do not enjoy "the privilege of litigation" in the federal courts. (17a) The court held that the process enjoyed by the prisoners in *Johnson* was inconsequential to the result, and that there is no meaningful difference between a war criminal convicted by a lawful tribunal and a person held with no charges and no opportunity to establish his innocence. (9a) The court further held that *Johnson* involved the rights of all aliens outside the sovereignty of the United States, rather than enemy aliens, as suggested throughout the opinion. (12a-13a) And finally, the court held that Guantánamo Bay is no different than wartime China because the lease grants Cuba "ultimate sovereignty" over the base.

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[15] The message from the Joint Chiefs read as follows: "Authority granted, *provided the Chinese Government acquiesces*, to appoint United States Military Commission in China for the trial of violation of the laws and customs of war…").

[16] The same is true of Landsberg prison, where the *Johnson* petitioners were detained. The United States shared jurisdiction and control over detentions in occupied Germany with other powers (the United Kingdom and France). *See* Basic Principles for Merger of the Three Western German Zones of Occupation and Creation of an Allied High Commission, reprinted in Senate Comm. on For. Rel's., 92nd Cong., Documents on Germany, 1944-70 (Comm. Print 1970), at 150-51.

(14a) These conclusions cannot be squared with either the letter or spirit of *Johnson*.

iv. *Johnson* Does Not Authorize Disregard Of The Due Process Rule Of *Asahi Metal*

But the decision of the D.C. Circuit below disregards more than this Court's reasoning in *Johnson*, *Reid*, and *Verdugo*. If the Court of Appeals is correct that "a 'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise'" (12a), then the holding in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987), has been rendered incomprehensible. In *Asahi*, the Court held that a foreign entity which had not voluntarily established the minimum contacts with the United States required by the due process doctrine of *International Shoe Company v. Washington*, 326 U.S. 310 (1945), could not constitutionally be served with process by an American state court. Yet according to the holding of the court below in the present case, the same lack of "property or presence in this country" that *gave* Asahi Metal a meritorious due process claim would have *deprived* it *ab initio* of constitutional protection "under the due process clause or otherwise." *See Haitian Centers Council, Inc. v. Sale*, 823 F. Supp. 1028, 1041 (E.D.N.Y. 1993)(relying on *Asahi Metal* to support constitutional protections for non-resident aliens held in Guantánamo Bay).

B. The Decision Below Conflicts with Decisions of Other Courts of Appeal

The D.C. Circuit's decision below is not only at odds with the decisions of this Court, but with the decisions of other courts of appeals. Guided by the *Insular Cases*, the courts of appeals have often extended fundamental constitutional rights to foreign nationals residing outside United States sovereignty but within its exclusive jurisdiction and control.

In the *Insular Cases*, the Court held that fundamental constitutional rights, including the Fifth Amendment, apply in the "unincorporated" territories.[17] Relying on this principle, the lower courts have extended fundamental constitutional rights to non-resident aliens in the Canal Zone, the Trust Territories, and the American Sector in post-war Berlin. At least one circuit has applied the Fifth Amendment to Guantánamo Bay.

For years, the Executive Branch has likened Guantánamo Bay to the Canal Zone. The treaties with Panama and Cuba were completed within weeks of each other. Panama granted the United States "in perpetuity" a zone across the Ithmus for the "construction, maintenance, operation, sanitation and protection" of a ship canal. The United States was granted "all the rights, power and authority within the zone...." Isthmian Canal Convention, Nov. 18, 1903, Arts. II-III, 33 Stat. 2234, 2234-35, TS No. 431. According to William Howard Taft, then Secretary of War, the Panama Agreement reserved "titular sovereignty" in the Panamanian government, meaning that when the United States chose to relinquish its treaty rights, title and possession would revert to Panama. States, Territories and Governments, 4 Whiteman DIGEST ON INTERNATIONAL LAW, at 267.

Thus, "[i]n one, no less than in the other, we acquired a

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[17] The term refers to the series of cases from *DeLima v. Bidwell*, 182 U.S. 1 (1901) to Insular cases *Balzac v. Porto Rico*, 258 U.S. 298 (1922). The cases have been severely criticized, *see, e.g., Reid v. Covert*, 354 U.S. 1, 14 (1957) (plurality opinion), but never overruled. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring). In *Dorr v. United States*, 195 U.S. 138 (1904), the Court recognized that the application of the constitution within the unincorporated territories cannot be undertaken mechanically, since "[t]he limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States...." *Id.* at 142; *see also Downes v. Bidwell*, 182 U.S. 244, 289 (1901) (White, J. concurring).

place subject to the use, occupation and control of the United States for a particular purpose...." 35 Op. Atty. Gen. 536 (1929) (internal citations omitted). Commentators have drawn the same parallel. *See e.g.*, Sedgwick W. Green, *Applicability of American Laws to Overseas Areas Controlled by the United States*, 68 HARV. L. REV. 781, 792 (1955) (U.S. status in Guantánamo is "in substance identical with that in the Canal Zone"); Neuman, *Anomalous Zones*, 48 STAN. L. REV. at 1228 n. 186 (1996) (citing *id.*).

In both areas, the United States leased the territory for an indefinite period and secured exclusive jurisdiction and control while reserving the underlying sovereignty to the foreign state. Based on this jurisdiction and control, the Fifth Circuit held that the Canal Zone was an "unincorporated territory" whose residents, alien and citizen alike, enjoyed the protection of fundamental constitutional rights. *See, e.g., United States v. Husband R. (Roach)*, 453 F.2d 1054, 1057-61 (5th Cir. 1971) ("Canal Zone is an unincorporated territory of the United States" and government action against alien must be measured against requirements of the due process clause); *Canal Zone v. Yanez P. (Pinto)*, 590 F.2d 1344, 1351 (5th Cir. 1979) (fundamental aspects of Confrontation Clause apply); *Canal Zone v. Scott*, 502 F.2d 566, 568 (5th Cir. 1974) (fundamental constitutional rights apply to citizens and aliens alike "since it is the territorial nature of the Canal Zone and not the citizenship of the defendant that is dispositive."); *cf. National Bd. of YMCA v. United States*, 395 U.S. 85, 89-90 (1969) (applying Takings Clause).

Likewise, the D.C. Circuit itself previously extended constitutional protections to the Trust Territory of the Pacific Islands, where the United States exercised complete jurisdiction and control, but was not sovereign. *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir.), *reh'g denied*, 569 F.2d 636 (D.C. Cir. 1977). In *Ralpho*, the D.C. Circuit held that

because the residents of the Territory were subject to American authority and oversight as much as in any unincorporated territory, fundamental constitutional rights apply. *Id.* at 618-19. Relying on the *Insular Cases* and *Canal Zone v. Scott*, *supra*, the Court reaffirmed that Ralpho's non-resident alien status did not deprive him of constitutional protection since "it is the locality that is determinative of the application of the Constitution..., and not the status of the people who live in it." *Ralpho* at 618-19; *see also Juda v. United States*, 6 Cl. Ct. 441 (1984) (Takings Clause applies to Marshall Islands and protects both alien and citizen).[18]

Similarly, constitutional rights extended to non-resident aliens within the American Sector in Berlin. In *United States v. Tiede*, 86 F.R.D. 227, 239 (U.S. Ct. for Berlin 1979), Judge Stern held that Polish citizens charged with diverting an aircraft from East to West Berlin were entitled to U.S. constitutional rights at their trial in West Berlin. *Id.* at 249-53. Like Guantánamo today, West Berlin was within the

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[18] The lower court did not discuss the Canal Zone cases. Its attempt to distinguish *Ralpho*, however, was decidedly unpersuasive. The court conceded that the United States was not sovereign over the Trust Territory, but held that because Congress had treated the islands as though they were "a territory of the United States" the *Insular Cases* entitled aliens on the islands to the benefit of the Due Process clause. (16a-17a) Yet the court did not undertake the same type of functional analysis of Guantánamo Bay, contenting itself with the observation that "Cuba – not the United States – has sovereignty" over the base. (15a) The court below also relied on the "reasoning" of *United States v. Spelar*, 338 U.S. 217 (1949), where the Court held that the Federal Tort Claims Act does not apply to a military base in Newfoundland because the base is in a foreign country. The lower court found this significant, as though Guantánamo's presence within Cuba had been relevant to the result. (15a-16a) The court apparently overlooked the fact that the Federal Tort Claims Act also does not apply to the Trust Territory. *Callas v. United States*, 253 F.2d 838, 839-40 (2d Cir. 1958), *cert. denied*, 357 U.S. 936 (1958).

United States' jurisdiction, but not its sovereignty.[19] It was also within effective American control; no other state could in practice block the exercise of our jurisdiction.

And of course, as the lower court recognized, the Second Circuit has previously extended constitutional protections to Guantánamo Bay. *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992), *vacated as moot sub nom. Sale v. Haitian Centers Council, Inc.*, 509 U.S. 918 (1993). In *McNary*, the Second Circuit concluded that the due process clause protects foreign nationals held by the United States in Guantánamo Bay because the Government exercises exclusive jurisdiction and control, even though the United States is not sovereign. *Id.* at 1343. Though the case was later vacated as moot, the Second Circuit continues to rely on its analysis of Guantánamo as having a "unique" status. *United States v. Gatlin*, 216 F.3d 207, 214 n.8 (2d Cir. 2000).

* * * *

In sum, the lower court has permitted the Government to detain allied nationals indefinitely, and to deprive them of any forum in which to contest the legality of their detention, because they have not set foot within the "ultimate sovereignty" of the United States. The United States has made the deliberate decision to bring the Petitioners to Guantánamo Bay, an area where it exercises undisputed dominion. Yet the Government maintains it may act without respect for the Constitution and without an obligation to account to the judiciary for the lawlessness of its actions, merely because "ultimate sovereignty" over Guantánamo Bay resides with Cuba.

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[19] United States jurisdiction there was "concurrent with that of the Berlin courts, except to the extent that the American Sector Commandant withdraws jurisdiction from the German courts in a given case," which he did in the *Tiede* case. 86 F.R.D. at 238; *see also id.* at 228 n.2.

The Government will likely respond that the United States is at war, as though that were sufficient reason for the Court to stay its hand. But "[e]mergency does not create power. Emergency does not increase granted power or diminish the restrictions imposed upon power granted...." *Home Building and Loan Ass'n v Blaisdell*, 290 U.S. 398, 425 (1934). "No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645-46 (1952) (Jackson, J., concurring).

The circumstances of the present emergency confirm the wisdom in these warnings. As the Government has made clear, this is not a traditional war with a plainly marked beginning and end, fought by distinctively uniformed armies on readily identifiable battlefields. It is, instead, a "war on terrorism." According to the Government, this "war" will be fought indefinitely, anywhere in the world.[20] By its very nature, this conflict has resulted in the detention of people whose garb and circumstances do not differ from those of any disengaged civilian.[21]

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[20] "The war on terrorism is a global campaign against a global adversary... It will not end until terrorist networks have been rooted out, wherever they exist. It will not end until the state sponsors of terror are made to understand that aiding, abetting and harboring terrorists has deadly consequences for those that try it." *Prepared Testimony of U.S. Secretary of Defense Donald H. Rumsfeld before the Senate Armed Services Committee on Progress in Afghanistan*, Washington, D.C., July 31, 2002, available at http://www.defenselink.mil/speeches/2002/s20020731-secdef3.html

[21] "The Taliban did not wear distinctive signs, insignias, symbols or uniforms. To the contrary, far from seeking to distinguish themselves from the civilian population of Afghanistan, they sought to blend in with civilian non-combatants, hiding in mosques and populated areas." Department of Defense News Briefing, *Statement of Secretary of Defense Donald H. Rumsfeld*, Feb. 8, 2002, available at http://www.dod.mil/news/Feb2002/t02082002_t0208sd.html.

As Government officials have admitted, the difficulty in distinguishing friend from foe has likely led to the detention of innocent people at Guantánamo.[22] The conditions that make this "war" unique are the same conditions that make it essential for the Government to provide some process by which innocent people can secure their release. They are the same conditions that make it essential for the Court to reject the Government's insistence that the law ends when war begins. *Cf. Liversidge v. Anderson*, (1942) A.C. 206, 244 ("In this country, amid the clash of arms, the laws are not silent.")

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari issue to review the judgment of the D.C. Circuit Court of Appeals. On review, the judgment of that court should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

JOSEPH MARGULIES
Counsel of Record
Margulies & Richman, plc
2520 Park Avenue, South
Minneapolis, MN 55404
(612) 872-4900

BARBARA J. OLSHANSKY
STEVEN MACPHERSON WATT
SHAYANA KADIDAL
MICHAEL RATNER
JEFFREY E. FOGEL
Center for Constitutional Rights
666 Broadway
New York, NY 10012
(212) 614-6430

Attorneys for Petitioners

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[22] *See, e.g.*, Katharine Q. Seelye, *A Nation Challenged: Captives; An Uneasy Routine at Cuba Prison Camp*, N.Y. TIMES, Mar. 16, 2002) (Deputy Commander at Guantanamo acknowledges "some [of the detainees] were 'victims of circumstance,' and probably innocent.")

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5251 Consolidated with
Nos. 02-5284, 02-5288

Argued December 2, 2002
Decided March 11, 2003

KHALED A. F. AL ODAH, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

THOMAS B. WILMER and JOSEPH MARGULIES argued the cause for appellants. With them on the briefs were NEIL H. KOSLOWE, MICHAEL RATNER, BETH STEPHENS, and L. BARRETT BOSS.

WILLIAM J. ACEVES was on the briefs of amici curiae The International Centre for the Legal Protection of Human Rights and International Human Rights Organizations and Law Scholars in support of appellants.

DAVID P. SHELDON was on the brief of amicus curiae National Association of Criminal Defense Lawyers in support of appellants.

PAUL D. CLEMENT, Deputy Solicitor General, U.S. Department of Justice, argued the cause for appellees. With him on the brief were ROSCOE C. HOWARD, JR., U.S. Attorney, GREGORY G. KATSAS, Deputy Assistant Attorney General, U.S. Department of Justice, GREGORY G. GARRE and DAVID B. SALMONS, Assistants to the Solicitor General, DOUGLAS N. LETTER, ROBERT M. LOEB and KATHERINE S. DAWSON, Attorneys.

DANIEL J. POPEO, RICHARD A. SAMP and PAUL D. KAMENAR were on the brief for amici curiae Washington Legal Foundation, et al., in support of appellees.

Before: RANDOLPH and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

Concurring opinion filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*:

Through their "next friends," aliens captured abroad during hostilities in Afghanistan and held abroad in United States military custody at the Guantanamo Bay Naval Base in Cuba brought three actions contesting the legality and conditions of their confinement. The ultimate question presented in each case is whether the district court had jurisdiction to adjudicate their actions.

I.

The Constitution, as its preamble also declares, empowers Congress to "provide for the common Defence." *U.S. CONST. art. I, § 8*. To that end, the Constitution gives Congress the power "To raise and support Armies," "To provide and maintain a Navy," "To declare War, grant

Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." *Id.* To that end as well, the Constitution invests the President with the "executive Power," and makes him "Commander in Chief" of the country's military. *Art. II, § § 1 & 2; see Ex parte Quirin, 317 U.S. 1, 25-26, 87 L. Ed. 3, 63 S. Ct. 2 (1942).*

In response to the attacks of September 11, 2001, and in the exercise of its constitutional powers, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the attacks and recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001). The President declared a national emergency, Proclamation No. 7453, Declaration of a National Emergency by Reason of Certain Terrorist Attacks, *66 Fed. Reg. 48,199* (Sept. 14, 2001), and, as Commander in Chief, dispatched armed forces to Afghanistan to seek out and subdue the al Qaeda terrorist network and the Taliban regime that had supported and protected it. During the course of the Afghanistan campaign, the United States and its allies captured the aliens whose next friends bring these actions.

In one of the cases (*Al Odah v. United States*, No. 02-5251), fathers and brothers of twelve Kuwaiti nationals detained at Camp X-Ray in Guantanamo Bay brought an action in the form of a complaint against the United States, President George W. Bush, Secretary of Defense Donald H. Rumsfeld, Chairman of the Joint Chiefs of Staff Gen. Richard B. Myers, Brig. Gen. Rick Baccus, whom they allege is the Commander of Joint Task Force 160, and Col. Terry Carrico, the Commandant of Camp X-Ray/Camp Delta. None of the plaintiffs' attorneys have communicated with the Kuwaiti detainees. The complaint alleges that the detainees were in Afghanistan and Pakistan as volunteers providing humanitarian aid; that local villagers seeking

bounties seized them and handed them over to United States forces; and that they were transferred to Guantanamo Bay sometime between January and March 2002. A representative of the United States Embassy in Kuwait informed the Kuwaiti government of their whereabouts. Invoking the Great Writ, *28 U.S.C. § § 2241-2242*; the *Alien Tort Act*, *28 U.S.C. § 1350*; and the *Administrative Procedure Act*, the *Al Odah* plaintiffs claim a denial of due process under the *Fifth Amendment*, tortious conduct in violation of the law of nations and a treaty of the United States, and arbitrary and unlawful governmental conduct. They seek a declaratory judgment and an injunction ordering that they be informed of any charges against them and requiring that they be permitted to consult with counsel and meet with their families.

Rasul v. Bush (No. 02-5288) is styled a petition for a writ of habeas corpus on behalf of three detainees, although it seeks other relief as well. The next friends bringing the petition are the father of an Australian detainee, the father of a British detainee, and the mother of another British detainee. Respondents are President Bush, Secretary Rumsfeld, Col. Carrico, and Brig. Gen. Michael Lehnert, who is alleged to be the Commander of Joint Task Force 160. The petition claims that the Australian detainee was living in Afghanistan when the Northern Alliance captured him in early December 2001; that one of the British detainees traveled to Pakistan for an arranged marriage after September 11, 2001; and that the other British detainee went to Pakistan after that date to visit relatives and continue his computer education. The next friends learned of their sons' detention at Guantanamo Bay from their respective governments. The *Rasul* petitioners claim violations of due process under the *Fifth* and *Fourteenth Amendments*, international law, and military regulations; a violation of the *War Powers Clause*; and a violation of *Article I of the Constitution* because of the President's alleged suspension of the writ of habeas corpus. They seek a writ of habeas corpus,

release from unlawful custody, access to counsel, an end to interrogations, and other relief.

Habib v. Bush (No. 02-5284) is also in the form of a petition for writ of habeas corpus and is brought by the wife of an Australian citizen, acting as his next friend. Naming President Bush, Secretary Rumsfeld, Brig. Gen. Baccus, and Lt. Col. William Cline as defendants, the petition alleges that Habib traveled to Pakistan to look for employment and a school for his children; that after Pakistani authorities arrested him in October 2001, they transferred him to Egyptian authorities, who handed him over to the United States military; and that the military moved him from Egypt to Afghanistan and ultimately to Guantanamo Bay in May 2002. Australian authorities visited Guantanamo and issued a press release confirming Habib's presence there. The *Habib* petition, like the other two cases, invokes the *Due Process Clause of the Fifth Amendment* and other constitutional provisions, the *Alien Tort Act*, the Administrative Procedure Act, due process under international law, and United States military regulations. Habib seeks a writ of habeas corpus, legally sufficient process to establish the legality of his detention, access to counsel, an end to all interrogations of him, and other relief.

The district court held that it lacked jurisdiction. Believing no court would have jurisdiction, it dismissed the complaint and the two habeas corpus petitions with prejudice. *Rasul v. Bush, 215 F. Supp. 2d 55, 56 (D.D.C. 2002)*. In the court's view all of the detainees' claims went to the lawfulness of their custody and thus were cognizable only in habeas corpus. *Id. at 62-64*. Relying upon *Johnson v. Eisentrager, 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950)*, the court ruled that it did not have jurisdiction to issue writs of habeas corpus for aliens detained outside the sovereign territory of the United States. *Rasul, 215 F. Supp. 2d at 72-73*.

II.

While these cases were pending, the Ninth Circuit affirmed an order dismissing a habeas corpus petition for all Guantanamo detainees on the ground that those bringing the action clergy, lawyers, and law professors - were not proper "next friends." *Coalition of Clergy, Lawyers & Law Professors v. Bush, 310 F.3d 1153, 1165 (9th Cir. 2002).* In the cases before us, the government does not question the "next friend" status of the individuals prosecuting the actions, at least insofar as they seek writs of habeas corpus. There is a long history, going back to the 1600s in England, of "next friends" invoking the Great Writ on behalf of prisoners who are unable to do so because of their inaccessibility. *Whitmore v. Arkansas, 495 U.S. 149, 162, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990).* For the federal courts, Congress codified the practice in 1948: a habeas corpus petition now may be brought "by the person for whose relief it is intended or by someone acting in his behalf." *28 U.S.C. § 2242.* The next friends in these cases have demonstrated through affidavits that they are "truly dedicated to the best interests of these individuals," that they have a "significant relationship" with the detainees, and that the named detainees are inaccessible. *Whitmore, 495 U.S. at 163-64.* We shall therefore treat the cases as if the detainees themselves were prosecuting the actions. *Id. at 163.*

In each of the three cases, the detainees deny that they are enemy combatants or *enemy* aliens. Typical of the denials is this paragraph from the petition in *Rasul*:

> The detained petitioners are not, and have never been, members of Al Qaida or any other terrorist group. Prior to their detention, they did not commit any violent act against any American person, nor espouse any violent act against any American person or property. On information and belief, they had no involvement, direct or indirect, in either the terrorist attacks on the United States September 11, 2001, or any act of international terrorism attributed by the United States to al Qaida or any terrorist group.

(As the district court pointed out, an affidavit from the father of the Australian detainee in *Rasul* admitted that his son had joined the Taliban forces. *Rasul, 215 F. Supp. 2d at 60 n.6.*) Although the government asked the district court to take judicial notice that the detainees are "enemy combatants," the court declined and assumed the truth of their denials. *Id. at 67 n.12.*

This brings us to the first issue: whether the Supreme Court's decision in *Johnson v. Eisentrager*, which the district court found dispositive, is distinguishable on the ground that the prisoners there were "enemy aliens." In the two and a half years leading up to the 1950 *Eisentrager* decision, "German enemy aliens confined by American military authorities abroad" filed more than 200 habeas corpus petitions invoking the Supreme Court's original jurisdiction. *339 U.S. at 768 n.1.* The Court denied each petition, often with four Justices announcing that they would dismiss for lack of jurisdiction. *Id.*; *see* Charles Fairman, *Some New Problems of the Constitution Following the Flag, 1 STAN. L. REV. 587, 593-600 (1949).* Justice Jackson, the author of the *Eisentrager* opinion, recused himself from each of the cases, doubtless because of his service (after his appointment to the Court) as Representative and Chief Counsel at the Nazi war crime trials in Nuremberg from 1945 to 1946. *See* Telford Taylor, *The Nuremberg Trials, 55 COLUM. L. REV. 488 (1955).*

Eisentrager differed from the earlier World War II habeas petitions. The case started not in the Supreme Court, but in a district court; and the Germans seeking the writ had not been convicted at Nuremberg. After Germany's surrender on May 8, 1945, but before the surrender of Japan, twenty-one German nationals in China assisted Japanese forces

fighting against the United States. The Germans were captured, tried by an American military commission headquartered in Nanking, convicted of violating the laws of war, and transferred to the Landsberg prison in Germany, which was under the control of the United States Army. *339 U.S. at 765-66*. One of the prisoners, on behalf of himself and the twenty others, sought writs of habeas corpus in the United States District Court for the District of Columbia, claiming violations of the Constitution, other laws of the United States, and the 1929 Geneva Convention. *Id. at 767*. The district court dismissed for lack of jurisdiction, but the court of appeals reversed. *Eisentrager v. Forrestal, 84 U.S. App. D.C. 396, 174 F.2d 961 (D.C. Cir. 1949)*.

The Supreme Court, agreeing with the district court, held that "the privilege of litigation" had not been extended to the German prisoners. *339 U.S. at 777-78*. (Although *Eisentrager* discussed only the jurisdiction of federal courts, state courts do not have jurisdiction to issue writs of habeas corpus for the discharge of a person held under the authority of the United States. *Tarble's Case, 80 U.S. (13 Wall.) 397, 20 L. Ed. 597 (1872)*.) The prisoners therefore had no right to petition for a writ of habeas corpus: "these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." *339 U.S. at 778*. Moreover, "trials would hamper the war effort and bring aid and comfort to the enemy." *Id. at 779*. Witnesses, including military officials, might have to travel to the United States from overseas. Judicial proceedings would engender a "conflict between judicial and military opinion" and "would diminish the prestige of" any field commander as he was called "to account in his own civil courts" and would "divert his efforts and attention from the military offensive abroad to the legal defensive at home." *Id.*

The detainees here are quite right that throughout its opinion, the Supreme Court referred to the *Eisentrager*

prisoners as "enemy aliens." The petitioners in *Habib* and *Rasul* distinguish themselves from the German prisoners on the ground that they have not been charged and that the charges in *Eisentrager* are what rendered the prisoners "enemies." For this they rely on Justice Brennan's dissenting opinion in *United States v. Verdugo-Urquidez, 494 U.S. 259, 290-91, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990)*. Brief for Appellants at 29 (No. 02-5284 et al.). *Eisentrager*, Justice Brennan wrote, "rejected the German nationals' efforts to obtain writs of habeas corpus not because they were foreign nationals, but because they were enemy soldiers." *494 U.S. at 291* (Brennan, J., dissenting). This seems to us doubly mistaken. In the first place, the German prisoners were not alleged to be "soldiers." They were civilian employees of the German government convicted of furnishing intelligence to the Japanese about the movement of American forces in China. *Eisentrager, 339 U.S. at 765-66*; *Eisentrager, 174 F.2d at 962*. In the second place, it was not their convictions - which they contested - that rendered them "enemy aliens." The Supreme Court made this explicit: "It is not for us to say whether these prisoners were or were not guilty of a war crime," *339 U.S. at 786*; "the petition of these prisoners admits[ ] that they are really alien enemies," *id. at 784*. The Court's description of the prisoners as "enemy aliens" rested instead on their status as nationals of a country at war with the United States. *Id. at 769 n.2* (quoting *Techt v. Hughes, 229 N.Y. 222, 229, 128 N.E. 185 (1920)* (Cardozo, J.)). (Although Germany surrendered in 1945, the state of war with Germany did not end until October 19, 1951. Pub. L. No. 82-181, 65 Stat. 451; *see United States ex rel. Jaegeler v. Carusi, 342 U.S. 347, 348 (1952)* (per curiam).) This is the time-honored meaning of the term. "Every individual of the one nation must acknowledge every individual of the other nation as his own enemy - because the enemy of his country." *The Rapid, 12 U.S. (8 Cranch) 155, 161, 3 L. Ed. 520 (1814)*; *see Guessefeldt v. McGrath, 342 U.S. 308, 96 L. Ed. 342, 72 S. Ct. 338 (1952)*; *Lamar v. Browne, 92 U.S.*

187, 194, 23 L. Ed. 650 (1875); J. Gregory Sidak, *War, Liberty, and Enemy Aliens, 67 N.Y.U. L. REV. 1402, 1406 (1992)*; *see also* The Alien Enemy Act of 1798, *50 U.S.C. § § 21-24*. Despite the government's argument to the contrary, it follows that none of the Guantanamo detainees are within the category of "enemy aliens," at least as *Eisentrager* used the term. They are nationals of Kuwait, Australia, or the United Kingdom. Our war in response to the attacks of September 11, 2001, obviously is not against these countries. It is against a network of terrorists operating in secret throughout the world and often hiding among civilian populations. An "alien friend" may become an "alien enemy" by taking up arms against the United States, but the cases before us were decided on the pleadings, each of which denied that the detainees had engaged in hostilities against America.

Nonetheless the Guantanamo detainees have much in common with the German prisoners in *Eisentrager*. They too are aliens, they too were captured during military operations, they were in a foreign country when captured, they are now abroad, they are in the custody of the American military, and they have never had any presence in the United States. For the reasons that follow we believe that under *Eisentrager* these factors preclude the detainees from seeking habeas relief in the courts of the United States.

The court of appeals in *Eisentrager* had ruled that "any person who is deprived of his liberty by officials of the United States, acting under the purported authority of that Government," and who can establish a violation of the Constitution, "has a right to the writ." *174 F.2d at 963*. This statement of law, unconstrained by the petitioner's citizenship or residence, by where he is confined, by whom or for what, "necessarily" followed - thought the court of appeals - from the *Fifth Amendment's* application to "any person" and from the court's view that no distinction could be made between "citizens and aliens." *Id. at 963-65*. As the Supreme Court described it, the court of appeals thus treated

the right to a writ of habeas corpus as a "subsidiary procedural right that follows from the possession of substantive constitutional rights." *339 U.S. at 781*.

In answer the Supreme Court rejected the proposition "that the *Fifth Amendment* confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses," *id. at 783*. The Court continued: "If the *Fifth Amendment* confers its rights on all the world ... [it] would mean that during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press, and assembly as in our *First Amendment*, right to bear arms as in the Second, security against 'unreasonable' searches and seizures as in the *Fourth*, as well as rights to jury trial as in the *Fifth* and *Sixth Amendments*." *Id. at 784*. (Shortly before Germany's surrender, the Nazis began training covert forces called "werewolves" to conduct terrorist activities during the Allied occupation. *See, e.g.*, http://www.archives.gov/iwg/declassified_records/oss_records_ 263_wilhelm_hoettl.html.) The passage of the opinion just quoted may be read to mean that the constitutional rights mentioned are not held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens. That is how later Supreme Court cases have viewed *Eisentrager*.

In 1990, for instance, the Court stated that *Eisentrager* "rejected the claim that aliens are entitled to *Fifth Amendment* rights outside the sovereign territory of the United States." *Verdugo-Urquidez, 494 U.S. at 269*. After describing the facts of *Eisentrager* and quoting from the opinion, the Court concluded that with respect to aliens "our rejection of the extraterritorial application of the *Fifth Amendment* was emphatic." *Id.* By analogy, the Court held that the *Fourth Amendment* did not protect nonresident aliens against unreasonable searches or seizures conducted outside the sovereign territory of the United States. Citing *Eisentrager* again, the Court explained that to extend the

Fourth Amendment to aliens abroad "would have serious and deleterious consequences for the United States in conducting activities beyond its borders," particularly since the government "frequently employs Armed Forces outside this country," *id. at 273*. A decade after *Verdugo-Urquidez*, the Court - again citing *Eisentrager* - found it "well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas v. Davis, 533 U.S. 678, 693, 150 L. Ed. 2d 653, 121 S. Ct. 2491 (2001)*.

Although the Supreme Court's statement in *Verdugo-Urquidez* about the *Fifth Amendment* was dictum, our court has followed it. In *Harbury v. Deutch, 344 U.S. App. D.C. 68, 233 F.3d 596, 604 (D.C. Cir. 2000), rev'd on other grounds sub nom. Christopher v. Harbury, 536 U.S. 403, 153 L. Ed. 2d 413, 122 S. Ct. 2179 (2002)*, we quoted extensively from *Verdugo-Urquidez* and held that the Court's description of *Eisentrager* was "firm and considered dicta that binds this court." Other decisions of this court are firmer still. Citing *Eisentrager*, we held in *Pauling v. McElroy, 107 U.S. App. D.C. 372, 278 F.2d 252, 254 n.3 (D.C. Cir. 1960)*, that "non-resident aliens ... plainly cannot appeal to the protection of the Constitution or laws of the United States." The law of the circuit now is that a "foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." *People's Mojahedin Org. v. Dep't of State, 337 U.S. App. D.C. 106, 182 F.3d 17, 22 (D.C. Cir. 1999)*; *see also 32 County Sovereignty Comm. v. Dep't of State, 292 F.3d 797, 799 (D.C. Cir. 2002)*.

The consequence is that no court in this country has jurisdiction to grant habeas relief, under *28 U.S.C. § 2241*, to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States. We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not. This much is at the heart of *Eisentrager*. If the Constitution does not entitle the detainees to due process, and it does not, they

cannot invoke the jurisdiction of our courts to test the constitutionality or the legality of restraints on their liberty. *Eisentrager* itself directly tied jurisdiction to the extension of constitutional provisions: "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *339 U.S. at 771*. Thus, the "privilege of litigation has been extended to aliens, *whether friendly or enemy*, only because permitting their presence in the country implied protection." *Id. at 777-78* (emphasis added). In arguing that *Eisentrager* turned on the status of the prisoners enemies, the detainees do not deny that if they are in fact in that category, if they engaged in international terrorism or were affiliated with al Qaeda, the courts would not be open to them. Their position is that the district court should have made these factual determinations at the threshold, before dismissing for lack of jurisdiction. But the Court in *Eisentrager* did not decide to avoid all the problems exercising jurisdiction would have caused, only to confront the same problems in determining whether jurisdiction exists in the first place.

It is true that after deciding jurisdiction did not exist, the Supreme Court, in part IV of its *Eisentrager* opinion, went on to consider and reject the merits of the prisoners' claims. From this the detainees reason that the Court's holding must have been merely that the military courts, rather than the civilian courts, had jurisdiction to try charges of war crimes, not that the district court lacked jurisdiction to adjudicate the habeas petition. We find it impossible to read the Court's statements - many of which we have already quoted - about the courts not being open to the prisoners as so limited. The discussion in part IV of the Court's opinion was extraneous. The dissenting Justices viewed it as such, calling part IV "gratuitous," "wholly irrelevant," lending "no support whatever to the Court's holding that the District Court was without jurisdiction." *339 U.S. at 792, 794* (Black, J., joined by Douglas and Burton, JJ., dissenting). There is a ready

explanation for the *Eisentrager* Court's method. Before *Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998)*, the Supreme Court (and the lower federal courts) were not always punctilious in treating jurisdiction as an antecedent question to the merits. The Court in *Steel Co.* acknowledged as much. *See 523 U.S. at 101*. Part IV of *Eisentrager*, whether an advisory opinion (*see 523 U.S. at 101*) or an alternative holding, does not detract from the central meaning of the decision that the district court did not have jurisdiction to issue writs of habeas corpus.

We have thus far assumed that the detainees are not "within any territory over which the United States is sovereign," *Eisentrager, 339 U.S. at 778*. The detainees dispute the assumption. They say the military controls Guantanamo Bay, that it is in essence a territory of the United States, that the government exercises sovereignty over it, and that in any event *Eisentrager* does not turn on technical definitions of sovereignty or territory.

The United States has occupied the Guantanamo Bay Naval Base under a lease with Cuba since 1903, as modified in 1934. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 *(6 Bevans 1113)* ("1903 Lease"); Relations With Cuba, May 9, 1934, U.S.-Cuba, T.S. No. 866 *(6 Bevans 1161)* ("1934 Lease"). In the 1903 Lease, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba" over the naval base. 1903 Lease, art. III. The term of the lease is indefinite. 1903 Lease, art. I; 1934 Lease, art. III ("So long as the United States of America shall not abandon the said naval station at Guantanamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has....").

The detainees think criminal cases involving aliens and United States citizens for activities at Guantanamo Bay support their position. But those cases arose under the special maritime and territorial jurisdiction, *see 18 U.S.C. §*

7. In *United States v. Lee, 906 F.2d 117 (4th Cir. 1990)* (per curiam), a Jamaican national was charged with committing a crime at Guantanamo. The indictment invoked the special maritime and territorial jurisdiction of the United States pursuant to *18 U.S.C. § 7* and *18 U.S.C. § 3238. Id. at 117 n.1*. Extension of federal criminal law pursuant to these provisions does not give the United States sovereignty over Guantanamo Bay any more than it gives the United States sovereignty over foreign vessels destined for this country because crimes committed onboard are also covered. *See 18 U.S.C. § 7(8)*.

The text of the leases, quoted above, shows that Cuba - not the United States - has sovereignty over Guantanamo Bay. This is the conclusion of *Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412 (11th Cir. 1995)*. The Eleventh Circuit there rejected the argument - which the detainees make in this case - that with respect to Guantanamo Bay "'control and jurisdiction' is equivalent to sovereignty." *Id. at 1425*. The Supreme Court reached the same conclusion in *Vermilya-Brown Co. v. Connell, 335 U.S. 377, 381, 93 L. Ed. 76, 69 S. Ct. 140 (1948)*. In holding that a naval base in Bermuda, controlled by the United States under a lease with Great Britain, was outside United States sovereignty, the Court took notice of the lease with Cuba for the Guantanamo Bay Naval Base and the fact that it granted the United States "substantially the same rights as it has in the Bermuda lease." *Id. at 383*. The "determination of sovereignty over an area," the Court held, "is for the legislative and executive departments." *Id. at 380*. The contrary decision of the Second Circuit, on which the detainees rely - *Haitian Centers Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992), vacated as moot, Sale v. Haitian Centers Council, Inc., 509 U.S. 918, 125 L. Ed. 2d 716, 113 S. Ct. 3028 (1993)* - has no precedential value because the Supreme Court vacated it. The decision was, in any event, at odds with the Supreme Court's reasoning not only in *Vermilya-Brown*, but also in *Spelar v. United States, 338 U.S. 217, 94 L. Ed. 3, 70*

S. Ct. 10 (1949). The Second Circuit's result rested in very large measure on its extraterritorial application of the *Fifth Amendment* to non-resident aliens, *see 969 F.2d at 1342-43*, a position we rejected in *People's Mojahedin Org. v. Dep't of State, 182 F.3d at 22*, and in *Harbury v. Deutch, 233 F.3d at 604*, and a position we reject again today. And the Second Circuit thought it important that the United States controlled Guantanamo Bay. *969 F.2d at 1342-44*. But under *Eisentrager*, control is surely not the test. Our military forces may have control over the naval base at Guantanamo, but our military forces also had control over the Landsberg prison in Germany.

We also disagree with the detainees that the *Eisentrager* opinion interchanged "territorial jurisdiction" with "sovereignty," without attaching any particular significance to either term. When the Court referred to "territorial jurisdiction," it meant the territorial jurisdiction of the United States courts, as for example in these passages quoted earlier: "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act" (*339 U.S. at 771*); and "the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of United States courts" (*id. at 778*). Sovereignty, on the other hand, meant then - and means now - supreme dominion exercised by a nation. The United States has sovereignty over the geographic area of the States and, as the *Eisentrager* Court recognized, over insular possessions, *id. at 780*. Guantanamo Bay fits within neither category.

As against this the detainees point to *Ralpho v. Bell, 186 U.S. App. D.C. 368, 569 F.2d 607 (D.C. Cir. 1977)*. After World War II, the United Nations designated the United States as administrator of the Trust Territory of Micronesia. *Id. at 612*. No country had sovereignty over the region, but the court treated Micronesia as if it were a territory of the United States, over which Congress could and did exercise

its power under *Article IV of the Constitution*. (The United States did not hold the Trust Territory "in fee simple ... but rather as trustee," a difference the court considered irrelevant. *Id. at 619*.) The court therefore described the residents of Micronesia as being "as much American subjects as those in other American territories." *Id.* In the *Micronesian Claims Act*, Congress established a commission to distribute a fund for claims against the United States for damages suffered during World War II. Because Congress intended the Micronesia Trust Territory to be treated as if it were a territory of the United States, the court held that the right of due process applied to the commission's actions. *Id. at 629-30*. Given the premises on which the court acted, its holding is hardly surprising. "Fundamental personal rights" found in the Constitution apply in territories. *See, e.g., Balzac v. Porto Rico, 258 U.S. 298, 312-13, 66 L. Ed. 627, 42 S. Ct. 343 (1922); see also Dorr v. United States, 195 U.S. 138, 148, 49 L. Ed. 128, 24 S. Ct. 808 (1904)* (considering the law applicable in the Philippines); *48 U.S.C. § 1421b* (Guam). *Ralpho* thus establishes nothing about the sort of *de facto* sovereignty the detainees say exists at Guantanamo. And its reasoning does not justify this court, or any other, to assert habeas corpus jurisdiction at the behest of an alien held at a military base leased from another nation, a military base outside the sovereignty of the United States.

III.

In addition to seeking relief explicitly in the nature of a habeas corpus, the detainees sued for injunctions and declaratory judgments under the Alien Tort Act, *28 U.S.C. § 1350*, alleging that the United States is confining them in violation of treaties and international law. The holding in *Eisentrager* - that "the privilege of litigation" does not extend to aliens in military custody who have no presence in "any territory over which the United States is sovereign" (*339 U.S. at 777-78*) - dooms these additional causes of

action, even if they deal only with conditions of confinement and do not sound in habeas. *See Wolff v. McDonnell, 418 U.S. 539, 554-55, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974); Brown v. Plaut, 327 U.S. App. D.C. 313, 131 F.3d 163, 167 (D.C. Cir. 1997).*

At the time of *Eisentrager*, the writ of habeas corpus extended to prisoners "in custody in violation of the Constitution or of a law or treaty of the United States," *28 U.S.C. § 453 (1946).* The current habeas statute, *28 U.S.C. § 2241(c)(3),* is very much the same. The prisoners in *Eisentrager* alleged violations of the Constitution, federal laws, and a treaty. So here. Each of the detainees alleges violations of the Constitution, treaties, and laws of the United States. The Alien Tort Act is a "law of the United States" and, the detainees believe, so is some international law. As to the latter, the theories are that federal common law incorporates "customary international law" and that the Alien Tort Act not only provides jurisdiction but also creates a cause of action theories the Second Circuit promulgated in *Filartiga v. Pena-Irala, 630 F.2d 876, 885-87 (2d Cir. 1980).* But as we have decided, the detainees are in all relevant respects in the same position as the prisoners in *Eisentrager*. They cannot seek release based on violations of the Constitution or treaties or federal law; the courts are not open to them. Whatever other relief the detainees seek, their claims necessarily rest on alleged violations of the same category of laws listed in the habeas corpus statute, and are therefore beyond the jurisdiction of the federal courts. Nothing in *Eisentrager* turned on the particular jurisdictional language of any statute; everything turned on the circumstances of those seeking relief, on the authority under which they were held, and on the consequences of opening the courts to them. With respect to the detainees, those circumstances, that authority, and those consequences differ in no material respect from *Eisentrager*.

IV.

We have considered and rejected the other arguments the detainees have made to the court. The judgment of the district court dismissing the complaint in No. 02-5251 and the petitions for writs of habeas corpus in Nos. 02-5284 and 02-5288 for lack of jurisdiction is *Affirmed.*[*]

RANDOLPH, *Circuit Judge*, concurring:

I write separately to add two other grounds for rejecting the detainees' non-habeas claims. But first some words are in order regarding the Alien Tort Act, *28 U.S.C. § 1350*:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

Three courts of appeals have decided that *§ 1350* not only provides a federal forum but also creates a cause of action for violations of the "law of nations." The Second Circuit, in the decision launching this development, held first, that *§ 1350* conferred jurisdiction over an action by citizens of Paraguay against another citizen of that country for torts allegedly committed in Paraguay; and second, that "customary international law" is part of federal common law. *Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).* The same court of appeals later reiterated that *§ 1350* provided jurisdiction and gave aliens - in this instance, Muslim and Croat citizens of Bosnia-Herzegovina - a cause of action against the leader of the Bosnia Serbs for violations of "the

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[*] Although Judges Garland and Williams have not joined Judge Randolph's concurring opinion, they do not intend thereby to express any view about its reasoning. They believe the issues addressed need not be reached.

law of nations" and treaties. *Kadic v. Karadzic, 70 F.3d 232, 241-44 (2d Cir. 1995)*; *see Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92-93 (2d Cir. 2000)*. The Ninth Circuit followed suit, holding that § *1350* gave a district court jurisdiction over the estate of the former Philippine President Marcos although all plaintiffs and defendants were Philippine nationals and although the torts, alleged to violate international law, occurred entirely in the Philippines. *Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litigation), 978 F.2d 493, 499 (9th Cir. 1992)*; *see also Hilao v. Estate of Marcos (In re Estate of Ferdinand E. Marcos, Human Rights Litigation), 25 F.3d 1467, 1473 (9th Cir. 1994)*; *Martinez v. City of Los Angeles, 141 F.3d 1373, 1383-84 (9th Cir. 1998)*. The Eleventh Circuit joined these courts of appeals in holding that § *1350* not only confers jurisdiction, but also gives federal courts the power to "fashion domestic common law remedies to give effect to violations of customary international law." *Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996)*.

The meaning of § *1350* has been an open question in our court. *See Tel-Oren v. Libyan Arab Republic, 233 U.S. App. D.C. 384, 726 F.2d 774, 777 (D.C. Cir. 1984)* (Edwards, J., concurring); *id. at 800* (Bork, J., concurring); *Sanchez-Espinoza v. Reagan, 248 U.S. App. D.C. 146, 770 F.2d 202, 20-07 (D.C. Cir. 1985)*. But what § *1350* does not mean has been decided. In the *Tel-Oren* case both Judge Bork and Judge Robb, in their separate concurring opinions, rejected the Second Circuit's *Filartiga* decision, Judge Bork on the ground that § *1350* does not create a cause of action, Judge Robb on the ground that *Filartiga* is "fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure." *See 726 F.2d at 801* (Bork, J.); *id. at 826 n.5* (Robb, J.). Since then some of the opinions following *Filartiga* maintain that Congress ratified its interpretation of § *1350. See, e.g., Kadic, 70 F.3d at 241*; *Hilao, 25 F.3d at 1475*; *Abebe-Jira, 72 F.3d at 848*; *see also* William S. Dodge, *The Historical*

Origins of the Alien Tort Statute: A Response to the "Originalists," 19 HASTINGS INT'L & COMP. L. REV. 221, 224, 256 (1996). The ratification argument rests on enactment of the *Torture Victim Protection Act of 1991*, which provides a cause of action for damages to anyone - aliens and citizens alike who suffered torture anywhere in the world at the hands of any individual acting under the law of any foreign nation. *28 U.S.C.* § *1350* note. The Torture Victim Act does not contain its own jurisdictional provision. But it is clear that any case brought pursuant to that statute would arise under federal law and thus come within *28 U.S.C.* § *1331*, the grant of general federal question jurisdiction. (I mean to imply nothing about the constitutionality of the statute.) The Alien Tort Act is thus beside the point: it confers jurisdiction only over suits by aliens and only for violations of treaties and the law of nations. The House Report on the torture victim bill did state that § *1350* "should remain intact to permit suits based on other norms that already exist or may ripen in the future into the rules of customary international law." Torture Victim Protection Act of 1991. H.R. REP. NO. 102-367, pt. 1, at 4 (1991). But the statement of one congressional committee is by no means a statement of "Congress," as some have supposed; the wish expressed in the committee's statement is reflected in no language Congress enacted; it does not purport to rest on an interpretation of § *1350*; and the statement itself is legislative dictum.

The detainees, or at least some of them, nevertheless have urged us to follow the *Filartiga* line of cases. I see a number of problems in doing so, in addition to those mentioned by Judges Bork and Robb in *Tel-Oren*. To hold that the Alien Tort Act creates a cause of action for treaty violations, as the *Filartiga* decisions indicate, would be to grant aliens greater rights in the nation's courts than American citizens enjoy. Treaties do not generally create rights privately enforceable in the courts. Without authorizing legislation, individuals may sue for treaty

violations only if the treaty is self-executing. *See, e.g., Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314, 7 L. Ed. 415 (1829) (Marshall, C.J.); McKesson HBOC, Inc. v. Islamic Republic of Iran, 348 U.S. App. D.C. 160, 271 F.3d 1101, 1107 (D.C. Cir. 2001); Princz v. Federal Republic of Germany, 307 U.S. App. D.C. 102, 26 F.3d 1166, 1174 n.1 (D.C. Cir. 1994); Holmes v. Laird, 148 U.S. App. D.C. 187, 459 F.2d 1211, 1220 (D.C. Cir. 1972); Tel-Oren, 726 F.2d at 808-10* (Bork, J., concurring). To illustrate, the detainees in this case claim that the military is confining them in violation of the Geneva Convention of 1949. But the second Geneva Convention, like the first, *see Eisentrager, 339 U.S. at 789 n.14*, is not self-executing for the reasons stated by Judge Bork in *Tel-Oren, 726 F.2d at 808-09*, and by the Fourth Circuit in *Hamdi v. Rumsfeld, 316 F.3d 450, 468-69 (4th Cir. 2003)*. No American citizen, therefore, has a cause of action under this treaty. Yet on the basis of *Filartiga*, and the theory that the Alien Tort Act itself creates a cause of action, aliens could bring suit for its violation. *Martinez, 141 F.3d at 1383-84*, illustrates the point. The Ninth Circuit, relying on *§ 1350*, sustained such a suit, brought by an alien against the City of Los Angeles for actions occurring in Mexico in violation of the "customary international law." The court of appeals derived this "customary international law" partly from the International Covenant on Civil and Political Rights. But the court neglected to mention that this multilateral agreement creates no judicially enforceable rights and that the Senate ratified the treaty on the basis that it "will not create a private cause of action in U.S. courts." S. EXEC. REP. NO. 102-23, at 9, 19, 23 (1992). I find it hard to believe the First Congress, which enacted the Alien Tort Act in 1789, intended to extend to aliens rights of actions withheld from the citizens of this country.

Filartiga's theory that federal common law incorporates customary international law also raises many issues. The theory was necessary to sustain the constitutionality of *§ 1350* as the Second Circuit interpreted and applied it. Early

in our history the Supreme Court held unconstitutional, in violation of *Article III*, the conferring of federal jurisdiction over suits by an alien against an alien. *Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304, 3 L. Ed. 108 (1809)*. In holding that federal common law somehow incorporates customary international law, the *Filartiga* court placed the case before it on the "arising under" head of jurisdiction without mentioning *Hodgson*. *See Illinois v. City of Milwaukee, 406 U.S. 91, 100, 31 L. Ed. 2d 712, 92 S. Ct. 1385 (1972)*. This avoided the difficulty the Supreme Court's decision posed, but it created quite a few difficulties of its own.

For one thing, *Article I, section 8, clause 10 of the Constitution* gives Congress the power to "define and punish ... Offenses against the Law of Nations." The Framers' original draft merely stated that Congress had the power to punish offenses against the law of nations, but when Gouverneur Morris of Pennsylvania objected that the law of nations was "often too vague and deficient to be a rule," the clause was amended to its present form. III ELLIOT'S DEBATES IN THE FEDERAL CONVENTION OF 1787 AS REPORTED BY JAMES MADISON 604 (James McClellan & M.E. Bradford eds., rev. ed. 1989). I believe this clause in *Article I, section 8*, particularly in light of the history just recounted, makes it abundantly clear that Congress - not the Judiciary - is to determine, through legislation, what international law is and what violations of it ought to be cognizable in the courts. Yet under *Filartiga*, it is the courts, not Congress who decide both questions. It is no answer to say that early Supreme Court cases looked to the "law of nations." The "law of nations" may have been part of the general federal common law in the days before *Erie R.R. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938)*, but even then "the law of nations" did not present "any Federal question." *N.Y. Life Ins. Co. v. Hendren, 92 U.S. 286, 286-87, 23 L. Ed. 709 (1875); see Oliver Am. Trading Co. v. Mexico, 264 U.S. 440, 442-43, 68 L. Ed. 778,*

44 S. Ct. 390 (1924). And for good reason. The political branches of our government may influence but they by no means control the development of customary international law. To have federal courts discover it among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers. As Judge Robb put it, the courts "ought not serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations." *Tel-Oren, 726 F.2d at 827* (Robb, J., concurring). Nothing in the Constitution expressly authorizes such free-wheeling judicial power. After *Erie* brought an end to "general federal common law," federal common law has been mostly interstitial or generated by the need for uniformity throughout the States. *See generally* HENRY J. FRIENDLY, BENCHMARKS 155-95 (1967). A federal common law of customary international law is justified by neither consideration. Congress, when it ratifies treaties, often does so with reservations in order to avoid altering domestic law. Yet treating customary international law as federal law would alter domestic law because of the *Supremacy Clause*. All of these problems, and more, including the lack of historical support for the *Filartiga* theory, are spelled out in Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 HARV. L. REV. 815 (1997)*, and in a later article by the same authors, *Federal Courts and the Incorporation of International Law, 111 HARV. L. REV. 2260 (1998). But see* Harold Hongju Koh, *Is International Law Really State Law?, 111 HARV. L. REV. 1824 (1998).*

As to the history of the Alien Tort Act, Judge Friendly wrote: this "old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, § 9, 1 Stat. 73, 77 (1789), no one seems to know whence it came." *IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).* The original version read:

> the district courts ... shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.

1 Stat. 73, 76-77 (1789). Two former members of our court thought that § *1350* might have been meant to cover only private, nongovernmental acts taken against aliens such as piracy. *Sanchez-Espinoza, 770 F.2d at 206 (Scalia, J.); Tel-Oren, 726 F.2d at 813-14, 822* (Bork, J., concurring). "More recent research of a competent scholar" (*Erie R.R., 304 U.S. at 72*) has shed new light on the origin of § *1350* and the purpose of the First Congress in enacting it. *See* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995).* Professor Sweeney marshals a vast amount of historical research on eighteenth century "prize law," which allowed private vessels having a marque to capture enemy ships. When the Articles of Confederation were in effect, state courts adjudicated claims by alien shipowners seeking the return of their captured vessels and reparations for the damages caused by the seizure. Adoption of the Constitution and the passage of the First Judiciary Act gave the federal courts exclusive jurisdiction in admiralty and thus exclusive jurisdiction over suits brought to recover ships captured in prize. There was still a question whether state courts had jurisdiction over cases in which the alien sued not for return of the ship, but only for reparations. It was only these cases, Professor Sweeney postulates, that the Alien Tort Act's author, Oliver Ellsworth, and his congressional colleagues, intended to cover by making clear that if the alien shipowner's suit sought only reparations, the state courts would have jurisdiction concurrent with the federal courts. Hence the words in the statute "for a tort only." If Professor

Sweeney is correct, the Alien Tort Act today is moribund, as in fact it had been for nearly two hundred years until the Second Circuit resuscitated it.

In view of my doubts about *Filartiga*, and the *Tel-Oren* majority's rejection of it, we might go ahead in this case and decide what *§ 1350* does mean. But it is unnecessary to do so, not only because *Eisentrager* disposes of the cases, but also because the detainees' treaty and international law claims are barred by sovereign immunity. Before explaining why, I need to add a disclaimer. At oral argument, the question arose whether next friend status may be recognized for suits under *§ 1350*. "Some courts have permitted 'next friends' to prosecute actions outside the habeas corpus context on behalf of infants, other minors, and adult mental incompetents." *Whitmore v. Arkansas, 495 U.S. 149, 162 n.4, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990)*. Here, the argument for the next friend device is that the detainees are allegedly barred from talking with anyone about bringing lawsuits on their behalf. The parties have not briefed the questions this argument raises and I express no opinion on its validity.

The United States or its officers may be sued only if there is a waiver of sovereign immunity. *See, e.g., Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 260, 142 L. Ed. 2d 718, 119 S. Ct. 687 (1999)*. We have held that the Alien Tort Act, whatever its meaning, does not itself waive sovereign immunity. *Industria Panificadora, S.A. v. United States, 294 U.S. App. D.C. 137, 957 F.2d 886, 886 (D.C. Cir. 1992)* (per curiam); *Sanchez-Espinoza, 770 F.2d at 207*; *see Canadian Transp. Co. v. United States, 214 U.S. App. D.C. 138, 663 F.2d 1081, 1092 (D.C. Cir. 1980)*. The detainees therefore rely on the waiver provision in the Administrative Procedure Act, *5 U.S.C. § 702*, which states: "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity ... shall

not be dismissed ... on the ground that it is against the United States...."

Although relying on the APA's waiver for agencies, the detainees do not identify which "agency" of the United States they have in mind. They have sued the President in each case, but the President is not an "agency" under the APA and the waiver of sovereign immunity thus does not apply to him. *See Franklin v. Massachusetts, 505 U.S. 788, 800-01, 120 L. Ed. 2d 636, 112 S. Ct. 2767 (1992)*; *Armstrong v. Bush, 288 U.S. App. D.C. 38, 924 F.2d 282, 289 (D.C. Cir. 1991)*. This leaves the military. The APA specifically excludes from its definition of "agency" certain functions, among which is "military authority exercised in the field in time of war or in occupied territory." *5 U.S.C. § § 551(1)(G), 701(b)(1)(G)*; *see id. § § 553(a)(1) & 554(a)(4)*, exempting military "functions" from the APA's requirements for rulemaking and adjudication; *United States ex rel. Schonbrun v. Commanding Officer, 403 F.2d 371, 375 n.2 (2d Cir. 1968)* (Friendly, J.). The district court ruled, in an alternative holding, that because of the military function exclusion, the APA does not waive sovereign immunity. *Rasul v. Bush, 215 F. Supp. 2d 55, 64 n.10 (D.D.C. 2002)*. I believe this is correct.

Each of the detainees, according to their pleadings, was taken into custody by American armed forces "in the field in time of war." I believe they remain in custody "in the field in time of war." It is of no moment that they are now thousands of miles from Afghanistan. Their detention is for a purpose relating to ongoing military operations and they are being held at a military base outside the sovereign territory of the United States. The historical meaning of "in the field" was not restricted to the field of battle. It applied as well to "organized camps stationed in remote places where civil courts did not exist," *Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 274, 4 L. Ed. 2d 268, 80 S. Ct. 297 (1960)* (Whittaker, J., joined by Stewart, J., concurring in part and dissenting in part). To allow judicial inquiry into

military decisions after those captured have been moved to a "safe" location would interfere with military functions in a manner the APA's exclusion meant to forbid. We acknowledged as much in *Doe v. Sullivan, 291 U.S. App. D.C. 111, 938 F.2d 1370, 1380 (D.C. Cir. 1991)*, when then-Judge Ruth Bader Ginsburg stated for the court that the APA's military function exclusion applied to cases in which a court was asked to "review military commands made ... in the aftermath of [ ] battle." It is also of no moment that the detainees were captured without Congress having declared war against any foreign state. "Time of war," as the APA uses it, is not so confined. The military actions ordered by the President, with the approval of Congress, are continuing; those military actions are part of the war against the al Qaeda terrorist network; and those actions constitute "war," not necessarily as the Constitution uses the word, but as the APA uses it. *See Campbell v. Clinton, 340 U.S. App. D.C. 149, 203 F.3d 19, 29-30 (D.C. Cir. 2000)* (Randolph, J., concurring in the judgment); *Mitchell v. Laird, 159 U.S. App. D.C. 344, 488 F.2d 611, 613 (D.C. Cir. 1973)*. The detainees are right not to contest this point. To hold that it is not "war" in the APA sense when the United States commits its armed forces into combat without a formal congressional declaration of war would potentially thrust the judiciary into reviewing military decision-making in places and times the APA excluded from its coverage.

I would therefore hold that the detainees cannot invoke the APA's waiver of sovereign immunity and that the district court correctly dismissed their claims under the Alien Tort Act for this additional reason.

I would also hold that the judicial review provisions of the APA, including the waiver of sovereign immunity, do not apply because the military decisions challenged here are "committed to agency discretion by law." *5 U.S.C. § 701(a)(2)*. This exclusion applies when "a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney, 470 U.S. 821,*

830, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985). The military's judgment about how to confine the detainees necessarily depends upon "'a complicated balancing of a number of factors which are particularly within its expertise.'" *Lincoln v. Vigil, 508 U.S. 182, 193, 124 L. Ed. 2d 101, 113 S. Ct. 2024 (1993)* (quoting *Heckler, 470 U.S. at 831*). The level of threat a detainee poses to United States interests, the amount of intelligence a detainee might be able to provide, the conditions under which the detainee may be willing to cooperate, the disruption visits from family members and lawyers might cause - these types of judgments have traditionally been left to the exclusive discretion of the Executive Branch, and there they should remain. *See Nat'l Fed'n of Fed. Employees v. United States, 284 U.S. App. D.C. 295, 905 F.2d 400, 406 (D.C. Cir. 1990); Schonbrun, 403 F.2d at 375 n.2.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5251 Consolidated with
Nos. 02-5284, 02-5288
Filed: June 2, 2003

KHALED A. F. AL ODAH, Next Friend of FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

Before: GINSBURG, *Chief Judge*, and EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL, and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

ORDER

Upon consideration of appellants' joint petition for rehearing en banc in case No. 02-5284 and No. 02-5288, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5251 Consolidated with
Nos. 02-5284, 02-5288
Filed: June 2, 2003

KHALED A. F. AL ODAH, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

Before: RANDOLPH and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

ORDER

Upon consideration of appellants' joint petition for rehearing in case No. 02-5284 and No. 02-5288, filed April 25, 2003, it is

ORDERED that the petition be denied.

Per Curiam

APPENDIX C

UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF
COLUMBIA

SHAFIQ RASUL,
SKINA BIBI, as Next Friend
of Shafiq Rasul, et al.,
Petitioners,

v.

GEORGE WALKER BUSH,
President of the United States,
et al.,
Respondents.

FAWZI KHALID
ABDULLAH FAHAD
AL ODAH, et al.,
Plaintiffs,

v.

UNITED STATES OF
AMERICA, et al.,
Defendants

Civil No. 02-299 (CKK),
Civil No. 02-828 (CKK)

MEMORANDUM OPINION
(July 30, 2002)

I. INTRODUCTION

Presently before the Court are two cases involving the federal government's detention of certain individuals at the United States Naval Base at Guantanamo Bay, Cuba. The question presented to the Court by these two cases is whether aliens held outside the sovereign territory of the United States can use the courts of the United States to pursue claims brought under the United States Constitution. The Court answers that question in the negative and finds that it is without jurisdiction to consider the merits of these two cases. Additionally, as the Court finds that no court would have jurisdiction to hear these actions, the Court shall dismiss both suits with prejudice.

Throughout their pleadings and at oral argument, Petitioners and Plaintiffs contend that unless the Court assumes jurisdiction over their suits, they will be left without any rights and thereby be held *incommunicado*. In response to this admittedly serious concern, the government at oral argument, conceded that "there's a body of international law that governs the rights of people who are seized during the course of combative activities." Transcript of Motion Hearing, June 26, 2002 ("Tr.") at 92. It is the government's position that "the scope of those rights are for the miliary and political branches to determine--and certainly that reflects the idea that other countries would play a role in that process." *Id.* at 91. Therefore, the government recognizes that these aliens fall within the protections of certain provisions of international law and that diplomatic channels remain an ongoing and viable means to address the claims raised by these aliens.[1] While these two cases provide no

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[1] The Court notes that, at least for Petitioner David Hicks in the *Rasul* case, diplomatic efforts by the Australian government have already commenced. First Am. Pet. for Writ of Habeas Corpus ("Am. Pet."), Ex. C., "Affidavit of Stephen James Kenny," Attach. 2 (Letter from Robert Cornall, Australian Attorney-General's Office to Stephen Kenny, counsel

opportunity for the Court to address these issues, the Court would point out that the notion that these aliens could be held *incommunicado* from the rest of the world would appear to be inaccurate.

After reviewing the extensive briefings in these cases, considering the oral arguments of the parties and their oral responses to the Court's questions, and reflecting on the relevant case law, the Court shall grant the government's motion to dismiss in both cases on the ground that the Court is without jurisdiction to entertain these claims.[2]

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for Petitioner Terry Hicks) ("Australia has indicated to the United States that it is appropriate that Mr. Hicks remain in US military custody with other detainees while Australia works through complex legal issues and conducts further investigations. . . . Australian authorities have been granted access to Mr. Hicks and will be granted further access if required.").

[2] In reaching its decision in the *Rasul* case, the Court considered the First Amended Petition for Writ of Habeas Corpus, the Exhibits to the Amended Petition for Writ of Habeas Corpus, the Memorandum in Support of the Amended Petition for Writ of Habeas Corpus, Respondents' Motion to Dismiss Petitioners' First Amended Petition for Writ of Habeas Corpus, Petitioners' Memorandum in Opposition to Respondents' Motion to Dismiss, and Respondents' Reply in Support of Their Motion to Dismiss Petitioners' First Amended Petition for Writ of Habeas Corpus. In reaching its decision in the *Odah* case, the Court considered the Amended Complaint, Plaintiffs' Motion for a Preliminary Injunction, Plaintiffs' Request for Expeditious Hearing on Plaintiffs' Motion for a Preliminary Injunction and Supporting Statement of the Facts that Make Expedition Essential, Defendants' Motion to Dismiss Plaintiffs' Complaint and Motion for a Preliminary Injunction, Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' Complaint and Motion for a Preliminary Injunction, Defendants' Reply in Support of Motion to Dismiss, Plaintiffs' Opposition to Defendants' Motion for Leave to Late File Their Reply In Support of Defendants' Motion to Dismiss and Response to Plaintiffs' Request for Expeditious Hearing, Plaintiffs' Consent Motion for Leave to File Post-Argument Brief Correcting Erroneous Statements by Defense Counsel at Oral Argument, Defendants' Response to Plaintiffs' Post-Argument Brief, and Plaintiffs' Reply to Defendants' Response to Plaintiffs' Post-Argument Brief.

II. PROCEDURAL HISTORY

Petitioners in *Rasul v. Bush*, Civil Action No. 02-299, filed their case on February 19, 2002, and have styled their action as a petition for writ of habeas corpus. Petitioner Shafiq Rasul and Asif Iqbal are citizens of the United Kingdom and are presently held in Respondents' custody at the United States Naval Base at Guantanamo Bay, Cuba. Am. Pet. PP 10, 14. Petitioner David Hicks is an Australian citizen who is also detained by Respondents at the military base at Guantanamo Bay. *Id.* P 5. Also included in the Petition are Skina Bibi, mother of Shafiq Rasul, Mohammed Iqbal, father of Asif Iqbal, and Terry Hicks, father of David Hicks. Petitioners request, *inter alia*, that this Court "order the detained petitioners released from respondents' unlawful custody," "order respondents to allow counsel to meet and confer with the detained petitioners, in private and unmonitored attorney-client conversations," and "order respondents to cease all interrogations of the detained petitioners, direct or indirect, while this litigation is pending." Am. Pet., Prayer for Relief, PP 4-6.

Plaintiffs in *Odah v. United States*, Civil Action No. 02-828, filed their action on May 1, 2002. The *Odah* case involves the detention of twelve Kuwaiti nationals who are currently being held in the custody of the United States at the United States Naval Base at Guantanamo Bay, Cuba. Am. Compl. at 4. The action is concurrently brought by twelve of their family members who join the suit and speak on behalf of the individuals in United States custody. *Id.* Unlike Petitioners in *Rasul*, the *Odah* Plaintiffs disclaim that their suit seeks release from confinement. Rather, Plaintiffs in *Odah* ask this Court to enter a preliminary and permanent injunction prohibiting the government from refusing to allow the Kuwaiti nationals to "meet with their families," "be informed of the charges, if any, against them," "designate and consult with counsel of their choice," and "have access

to the courts or some other impartial tribunal." *Id.* P 40.[3] Plaintiffs' Amended Complaint contains three counts. First, Plaintiffs contend that Defendants' conduct denies the twelve Kuwaiti nationals due process in violation of the Fifth Amendment to the Constitution. *Id.* P 37. Second, Plaintiffs argue that Defendants' actions violate the Alien Tort Claims Act, *28 U.S.C. § 1350. Id.* P 38. Lastly, Plaintiffs allege that

[3] After full briefing and oral argument on Defendants' Motion to Dismiss in the *Odah* case, Plaintiffs filed an Amended Complaint, which they filed as of right pursuant to Rule 15 of the Federal Rules of Civil Procedure. In a conference call with the Court, Plaintiffs represented that there were three specific differences between the Amended Complaint and the original Complaint. First, the Amended Complaint added two new plaintiffs to the action, a Kuwaiti national held at the military base at Guantanamo Bay and a member of his family who brings the suit on his behalf. Originally, there had only been twenty-two Plaintiffs. *Compare* Compl. PP 3, 4, *with* Am. Compl. PP 3, 4. Second, Plaintiffs abandoned their request that the Court order Defendants to turn Plaintiffs, held at the military base at Guantanamo Bay, over to the Kuwaiti government. Compl. P 44. Third, Plaintiffs made an effort to clarify the four specific requests for relief that they seek in this case. *Compare* Compl. P 42, *with* Am. Compl. P 40.

Ordinarily, when the Court receives an amended complaint after a defendant files a motion to dismiss, it denies the motion to dismiss without prejudice and requests that the defendant re-file the motion based on the allegations presented in the amended complaint. In this case, based on the Court's review of the Amended Complaint, it appears that such a procedure would be a useless exercise since the legal theories underlying Defendants' present motion to dismiss will not be affected by the filing of the Amended Complaint. Defendants agree with the Court and contend that the amendments will not impact upon the Court's ruling on the motion to dismiss. Accordingly, the Court will apply Defendants' motion to dismiss to Plaintiffs' Amended Complaint. *See Nix v. Hoke, 62 F. Supp. 2d 110, 115 (D.D.C. 1999)* (citing cases); *see also* 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1476 (2d ed. 1990) ("Defendants should not be required to file a new motion to dismiss simply because an amended pleading was introduced while their motion was pending. If some of the defects raised in the original motion remain in the new pleading, the court simply may consider the motion as being addressed to the amended pleading. To hold otherwise would be to exalt form over substance.").

Defendants' conduct constitutes arbitrary, unlawful, and unconstitutional behavior in violation of the Administrative Procedure Act, *5 U.S.C. § § 555,* 702, 706. *Id.* P 39.

In the *Rasul* case, Respondents moved to dismiss the First Amended Petition for Writ of Habeas Corpus on March 18, 2002. This motion was fully briefed on April 29, 2002. On May 1, 2002, the *Odah* case was filed and Plaintiffs designated it as related to the *Rasul* matter. Thus, *Odah* was assigned to this Court. Plaintiffs in *Odah* moved for a preliminary injunction at the time they filed their suit. Instead of filing a memorandum in opposition to the motion for preliminary injunction, Defendants in the *Odah* case moved to dismiss the action. That motion was fully briefed on June 14, 2002.[4]

At the time the Court received the motion to dismiss in the *Odah* matter, it became obvious to the Court that the government was moving to dismiss both cases primarily on jurisdictional grounds. Accordingly, the Court found it

[4] The Court's initial briefing schedule in the *Odah* case did not contemplate that Defendants would be moving to dismiss the entire action. Rather the Court's briefing schedule set forth a date for Defendants to respond to Plaintiffs' motion for preliminary injunction. *Odah v. United States*, Civ. No. 02-828 (D.D.C. May 14, 2002) (order setting forth briefing schedule). Instead of filing an opposition to the motion for a preliminary injunction, on the date that their opposition to the preliminary injunction was due, Defendants moved to dismiss the entire case (and, by inference, the motion for preliminary injunction). Plaintiffs filed a timely opposition to Defendant's motion. Defendants then filed a reply, which Plaintiffs argued was inappropriate since the Court's initial briefing schedule did not set a date for Defendants to file a reply. However, when the Court set the initial briefing schedule, it was only concerned with receiving a response to the motion for preliminary injunction. Defendants were clearly within their right to move for dismissal of the entire action, which would permit them the opportunity to file a reply to their motion to dismiss. Although Defendants filed their reply late, the Court shall grant them leave to file the reply. To the extent that Plaintiffs' opposition to Defendants' filing of a reply brief responds to new issues first raised in Defendants' reply, the Court shall consider Plaintiffs' response as a surreply to Defendants' motion to dismiss.

appropriate to make a threshold ruling on the jurisdictional question in both cases before conducting any further proceedings. Mindful of the importance of these suits, which raise concerns about the actions of the Executive Branch, the Court heard oral argument on the government's motion to dismiss in both cases on June 26, 2002.

III. FACTUAL BACKGROUND[5]

A. Rasul v. Bush

Little is known about Petitioner David Hicks except that he was allegedly living in Afghanistan at the time of his seizure by the United States Government. Am. Pet. P 22. As for Petitioner Rasul, in the summer of 2001, he allegedly took a hiatus from studying for his computer engineering degree to travel. *Id.* P 24. Allegedly, Petitioner Rasul's brother convinced him to move to Pakistan "to visit relatives and explore his culture." *Id.* Petitioner Rasul left the United Kingdom after September 11, 2001, and allegedly traveled to Pakistan solely to attempt to continue his education at less expense than it would cost to take similar courses in the United Kingdom. *Id.* Petitioner Rasul allegedly stayed with an Aunt in Lahore, Pakistan before engaging in further travel within that country. *Id.* Allegedly, forces fighting against the United States captured and kidnapped Petitioner Rasul after he left Lahore. *Id.*

As for Petitioner Iqbal, it is alleged that in July of 2001, his family arranged for him to marry a woman living in the same village in Pakistan as Petitioner Iqbal's father. *Id.* P 23. After September 11, 2001, Petitioner Iqbal left the United Kingdom and allegedly traveled to Pakistan solely for the purpose of getting married. *Id.* In early October of 2001,

[5] For purposes of the instant motions to dismiss, the allegations of the Amended Petition/Amended Complaint are taken as true. The facts in this section are presented accordingly, and do not constitute factual findings by this Court.

shortly before the marriage, Petitioner Iqbal's father allegedly allowed Petitioner Iqbal to leave the village briefly. *Id.* After leaving the village, forces working in opposition to the United States allegedly captured Petitioner Iqbal. *Id.*

Petitioners Rasul, Iqbal, and Hicks were picked up in a region of the world where the United States is actively engaged in military hostilities authorized by a Joint Resolution of the United States Congress, passed on September 18, 2001, in wake of the September 11, 2001, terrorist attacks. The Joint Resolution authorizes the President to:

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224 (2001) (cited in Am. Pet. P 25). In the course of the military campaign authorized by the Joint Resolution, the United States attacked the Taliban, the ruling government of Afghanistan. Am. Pet. P 25. While seeking to overthrow the Taliban, the United States provided military assistance to the Northern Alliance, "a loosely knit coalition of Afghani and other military groups opposed to the Taliban Government." *Id.* P 26.

The Northern Alliance captured Petitioner David Hicks in Afghanistan and transferred custody of him to the United States on December 17, 2001. *Id.* P 27. The precise circumstances surrounding Petitioner Rasul's and Petitioner Iqbal's capture are unknown. However, they appear to have

been transferred to United States control in early December of 2001. *Id.* P 28.

It is alleged in the Amended Petition that at no time did any of the Petitioners in United States custody voluntarily join any terrorist force. *Id.* P 30.[6] n6 Additionally, if any of the Petitioners in United States custody "ever took up arms in the Afghani struggle, it was only on the approach of the enemy, when they spontaneously took up arms to resist the invading forces, without having had time to from themselves into regular armed units, and carrying their arms openly and respecting all laws and customs of war." *Id.* Additionally, it is alleged in the Amended Petition that if Petitioners Rasul, Iqbal, and David Hicks were in Afghanistan prior to being captured, "it was in order to facilitate humanitarian assistance to the Afghani people." *Id.* P 31. Furthermore, these Petitioners allegedly "have taken no step that was not fully protected as their free exercise of their religious and personal beliefs." *Id.*

B. *Odah v. United States*

The twelve Kuwaiti nationals in the *Odah* case, who are in United States custody at the military base at Guantanamo Bay, were in Afghanistan and Pakistan, some before and some after, September 11, 2001. Am. Compl. P 14. These

[6] While denying a role in any terrorist activity, Petitioners in their Amended Petition for Writ of Habeas Corpus conspicuously neglect to deny that they took up arms for the Taliban. In fact, in an exhibit attached to the Amended Petition, Petitioner Terry Hicks, who has brought this suit on behalf of his son, indicates that his son had joined the Taliban forces. Am. Pet., Ex. C., "Affidavit of Stephen James Kenny," Attach. 8 (Letter from Stephen Kenny, counsel for Petitioner Terry Hicks to Respondent Bush) ("It is our client's understanding that his son subsequently joined the Taliban forces and on 8 December 2001 was captured by members of the Northern Alliance."). Interestingly, this fact has been omitted from the text of the Amended Petition, but can be found only by a careful reading of an exhibit attached to the Amended Petition. *Id.*

individuals were allegedly in those countries as volunteers for charitable purposes to provide humanitarian aid to the people of those countries. *Id.* The government of Kuwait allegedly supports such volunteer service by continuing to pay the salaries of its Kuwaiti employees while they engage in this type of volunteer service abroad. *Id.*

According to the Amended Complaint, none of those held in United States custody are, or have ever been, a combatant or belligerent against the United States, or a supporter of the Taliban or any terrorist organization. *Id.* P 15. Villagers seeking bounties or other promised financial rewards allegedly seized the twelve Kuwaiti Plaintiffs against their will in Afghanistan or Pakistan. *Id.* P 16. Subsequently these twelve Plaintiffs were transferred into the custody of the United States. *Id.* At various points in time, beginning in January of 2002, these twelve Plaintiffs were transferred to Guantanamo Bay. *Id.* PP 19-21.[7]

IV. LEGAL STANDARD DISTRICT COURTS USE IN EVALUATING MOTIONS TO DISMISS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

In both matters before the Court, the government has moved to dismiss on jurisdictional grounds. Before a federal court can hear a case, it must ascertain that it has jurisdiction over the underlying subject matter of the action. *Bender v. Williamsport Area School Dist., 475 U.S. 534, 541, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986)* ("Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.").

Motions to dismiss for lack of jurisdiction over the subject matter of the action are proper under Federal Rule of Civil Procedure 12(b)(1). In the Rule 12(b)(1) context, the plaintiff bears the burden of proving jurisdiction. *McNutt v.*

[7] It has not been confirmed that Plaintiff Mohammed Funaitel Al Dihani is currently in custody at Guantanamo Bay. Am. Compl. P 21.

General Motors Acceptance Corp., 298 U.S. 178, 182-83, 80 L. Ed. 1135, 56 S. Ct. 780 (1936). In both matters, the government challenges the actual complaint (and/or petition) itself, without relying on matters outside the pleadings. *See generally Hohri v. United States, 251 U.S. App. D.C. 145, 782 F.2d 227, 241 (D.C. Cir. 1986), vacated on other grounds, 482 U.S. 64, 96 L. Ed. 2d 51, 107 S. Ct. 2246 (1987)* (explaining that materials *aliunde* pleadings can be considered on a Rule 12(b)(1) motion). One commentator has referred to this type of motion as a "facial challenge" to a complaint, because a district court is not asked to review documents outside the pleadings. 2 James Wm. Moore et al., *Moore's Federal Practice*, § 12.30[4], at 39 (3rd ed. 2002) ("A facial attack questions the sufficiency of the pleading."). As both motions to dismiss before the Court present such "facial challenges," the Court must accept all of the Amended Petition's/Amended Complaint's well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in Petitioners'/Plaintiffs' favor. *United Transp. Union v. Gateway Western R.R., 78 F.3d 1208, 1210 (7th Cir. 1996)* (*citing Rueth v. EPA, 13 F.3d 227, 229 (7th Cir. 1993)).*[8]

V. DISCUSSION

A. Alien Tort Statute and Administrative Procedure Act Claims

1. Rasul v. Bush

The Amended Petition for a Writ of Habeas Corpus in the *Rasul* action states that "Petitioners bring this action under *28 U.S.C. § § 2241* and 2242, and invoke this Court's

[8] Notably, there are a few attachments to the Amended Petition for Writ of Habeas Corpus which the Court cites in this Memorandum Opinion. The Court does not consider these matters to be outside the pleadings because they were attached as exhibits to the Amended Petition.

jurisdiction under *28 U.S.C. § § 1331,* 1350, 1651, 2201, and 2202, *5 U.S.C. § 702;* as well as the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the International Covenant on Civil and Political Rights ("ICCPR"), the American Declaration on the Rights and Duties of Man ("ADRDM"), and Customary International Law." Am. Pet. P 2. While Petitioners seek to invoke this Court's jurisdiction under a host of separate provisions, the suit is *brought* explicitly as a petition for writs of habeas corpus pursuant to *28 U.S.C. § § 2241* and 2242.

It has long been held that challenges to an individual's custody can only be brought under the habeas provisions. *See Chatman-Bey v. Thornburgh, 274 U.S. App. D.C. 398, 864 F.2d 804, 807 (D.C. Cir. 1988) (en banc)* ("Habeas is . . . 'a fundamental safeguard against unlawful custody.'") (quoting Justice Harlan's dissent in *Fay v. Noia, 372 U.S. 391, 449, 9 L. Ed. 2d 837, 83 S. Ct. 822, 24 Ohio Op. 2d 12 (1963)); Monk v. Secretary of the Navy, 253 U.S. App. D.C. 293, 793 F.2d 364, 366 (D.C. Cir. 1986)* ("In adopting the federal habeas corpus statute, Congress determined that habeas corpus is the appropriate federal remedy for a prisoner who claims that he is 'in custody in violation of the Constitution . . . of the United States.'") (quoting *28 U.S.C. § 2241* (c)(3)). As Petitioners seek to be "released from respondents' unlawful custody," the Court can consider this case only as a petition for writs of habeas corpus and not as an action brought pursuant to the Alien Tort Statute, *28 U.S.C. § 1350,* or any of the other jurisdictional bases suggested in the Amended Petition. The exclusive means for securing the relief Petitioners seek is through a writ of habeas corpus.

2. Odah v. United States

Seeking to avoid having the Court consider their case as a petition for writ of habeas corpus, Plaintiffs in *Odah*

disclaim any desire to be released from confinement. Am. Compl. at 4. In fact, Plaintiffs have filed an Amended Complaint that eliminates an earlier request that this Court consider transferring the twelve Kuwaiti detainees to Kuwait. By eliminating this request, Plaintiffs endeavor to distance themselves from anything that might be construed as an effort to seek their release from United States custody. Instead, Plaintiffs in *Odah* ask this Court to enter a preliminary and permanent injunction prohibiting the government from refusing to allow the Kuwaiti nationals to "meet with their families," "be informed of the charges, if any, against them," "designate and consult with counsel of their choice," and "have access to the courts or some other impartial tribunal." Am. Compl. P 40.

While purporting not to seek release from confinement, Plaintiffs in their Amended Complaint plainly challenge the lawfulness of their custody. The Supreme Court has held that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody." *Preiser v. Rodriguez, 411 U.S. 475, 484, 36 L. Ed. 2d 439, 93 S. Ct. 1827 (1973).* As the United States Court of Appeals for the District of Columbia Circuit stated in *Chatman-Bey*, "as previously suggested, the modern habeas cases teach, broadly, that habeas is designed to test the lawfulness of the government's asserted right to *detain* an individual." *Chatman-Bey, 864 F.2d at 809* (emphasis in original); *see also Razzoli v. Federal Bureau of Prisons, 343 U.S. App. D.C. 357, 230 F.3d 371, 373 (D.C. Cir. 2000)* ("We adhere to *Chatman-Bey*: for a federal prisoner, habeas is indeed exclusive even when a non-habeas claim would have a merely probabilistic impact on the duration of custody.").

In the present case, Plaintiffs' fourth request for relief squarely challenges the validity of Plaintiffs' detention. Plaintiffs seek to have "access to the courts or some other impartial tribunal." Am. Compl. P 40. Elaborating on this request, Plaintiffs have told the Court that they seek access to an impartial tribunal in order to "expeditiously establish their

innocence and be able to return to Kuwait and their families." Pls.' Mem. of P. & A. in Supp. of Mot. for a Prelim. Inj. ("Pls.' Mem.") at 2. Without question, this prayer for relief is nothing more than a frontal assault on their confinement. While Plaintiffs in this case state that they do not seek immediate release, neither did the plaintiffs in *Chatman-Bey* or *Monk*. Nevertheless, the District of Columbia Circuit in both of those cases found that the federal habeas statute was the only lawful way for the petitioners to challenge their confinement. *Chatman-Bey, 864 F.2d at 809; Monk, 793 F.2d at 366.* In the *Odah* case, Plaintiffs seek to be presented immediately before a court to exonerate themselves "expeditiously." This type of claim is within the exclusive province of the writ of habeas corpus.[9]

The other provisions of Plaintiffs' request for relief, namely that they be permitted to "meet with their families," "be informed of the charges, if any, against them," and "designate and consult with counsel of their choice," Am. Compl. P 40, are directly related to their request to be brought before a court which would determine the extent of their entitlement to rights. Plaintiffs cannot escape having the Court convert their action into writs for habeas corpus by adding these three additional requests for relief.

Plaintiffs argue that they merely seek to challenge the *conditions* of their confinement relying principally on *Gerstein v. Pugh, 420 U.S. 103, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975).* Pls.' Opp'n to Defs.' Mot. to Dismiss Pls.' Compl. and Mot. for a Prelim. Inj. ("Pls.' Opp'n") at 19-20. The Supreme Court in *Gerstein* found that, pursuant to *42 U.S.C. § 1983*, a declaratory judgment action against state officials was a permissible means to address whether a person arrested and held for trial under a prosecutor's

[9] Plaintiffs cite to the habeas statutes as a basis for the Court's jurisdiction over their claims. Am. Compl. P 1. Even though Plaintiffs have disavowed that their action is one sounding in habeas, the *Amended* Complaint continues to rely on the habeas statutes to provide this Court with jurisdiction.

information was constitutionally entitled to a probable cause hearing before a judge. *Gerstein, 420 U.S. at 107 n.5.* Thus, the Supreme Court concluded that such an action did not need to be filed as a habeas petition. *Id.* n.6 ("Respondents did not ask for release from state custody, even as an alternative remedy. They asked only that the state authorities be ordered to give them a probable cause determination.").

There are clear differences between the claims presented in *Odah* and those addressed by the Court in *Gerstein*. As the Third Circuit has noted, "In *Gerstein v. Pugh*, the constitutional validity of a method of pretrial procedure, *rather than its application to any particular case, was the focus of the challenge." Tedford v. Hepting, 990 F.2d 745, 749 (3d Cir. 1993)* (emphasis added). The *Gerstein* Court recognized that the pretrial custody of the named plaintiffs had long since expired. *Gerstein, 420 U.S. at 110 n.11.* Accordingly, the claims the *Gerstein* Court addressed were focused on the constitutional adequacy of a pretrial procedure as it existed in the abstract. Plaintiffs in *Odah*, on the other hand, each seek a hearing on the merits of their individualized detentions.

In addition, Plaintiffs have not brought a declaratory judgment action seeking to invalidate some procedure that would not impact the duration of their confinement. The issue in *Odah* is Plaintiffs' desire to have a hearing before a neutral tribunal. For such a claim, a petition for writ of a habeas corpus is the exclusive avenue for relief.[10] Thus, as it

[10] Plaintiffs' citation to *Brown v. Plaut* is similarly unavailing. Pls.' Opp'n at 20 (citing *Brown v. Plaut, 327 U.S. App. D.C. 313, 131 F.3d 163 (D.C. Cir. 1997)).* The *Brown* case involved a prisoner's challenge to a decision to place him in administrative segregation. The Court of Appeals held that such action did not have to be brought as a petition for writ of habeas corpus. *131 F.3d at 167.* In that case, the appellate panel observed that the Supreme Court "has never deviated from *Preiser*'s clear line between challenges to the fact or length of custody and challenges to the conditions of confinement." *131 F.3d at 168.* Plaintiffs' broad request to be produced before a tribunal is obviously a challenge "to the fact . . . of custody." *Id.* Accordingly, *Brown* does not apply to this case.

does in *Rasul*, the Court shall review the jurisdictional basis of the *Odah* case as if it were styled as a petition for writ of habeas corpus.[11]

[11] Alternatively, the Court notes that in order for the government to be sued under the Alien Tort Statute, the government must waive its sovereign immunity. *FDIC v. Meyer, 510 U.S. 471, 475, 127 L. Ed. 2d 308, 114 S. Ct. 996 (1994)* ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."). Plaintiffs argue that Section 702 of the Administrative Procedure Act provides such a waiver. Pls.' Opp'n at 24 (citing *Sanchez-Espinoza v. Reagan, 248 U.S. App. D.C. 146, 770 F.2d 202, 207 (D.C. Cir. 1985)* (Scalia, J.) (stating that while the Alien Tort Statute does not provide a waiver of sovereign immunity, "with respect to claims against federal [officials] for *nonmonetary* relief . . . the waiver of the Administrative Procedure Act . . . is arguably available") (emphasis in original)).

Assuming that Section 702 of the Administrative Procedure Act provides a waiver, the Court finds that the actions of the government in this case would be exempt by *5 U.S.C. § 701*(b)(1)(G) (providing an exemption for, "military authority exercised in the field in time of war or in occupied territory"). Cases that have analyzed Section 701(b)(1)(G) have had occasion to address it only in the context of "judicial interference with the relationship between soldiers and their military superiors." *Doe v. Sullivan, 291 U.S. App. D.C. 111, 938 F.2d 1370, 1380 (D.C. Cir. 1991).* Despite the absence of pertinent case law, the language of Section 701(b)(1)(G) supports the view that this Court is unable to review the claim Plaintiffs make under the Administrative Procedure Act. There is no dispute that Plaintiffs were captured in areas where the United States was (and is) engaged in military hostilities pursuant to the Joint Resolution of Congress. Am. Compl. P 16 ("the Kuwaiti Detainees were seized against their will in Afghanistan or Pakistan"). This situation plainly falls within Section 701(b)(1)(G).

The Court was unable to find any material in the legislative history that addressed Section 701(b)(1)(G) of the Administrative Procedure Act, *see, e.g.*, S. Rep. No. 89-1350, at 32-33 (1966); H.R. Rep. No. 89-901, at 16 (1965), and the parties have not provided any legislative history, that would change the Court's view of this provision. Furthermore, granting Plaintiffs relief under the Administrative Procedure Act would produce a bizarre anomaly: United States soldiers would be unable to use the courts of the United States to sue about events arising on the battlefield, while aliens, with no connection to the United States, could sue their United States military captors while hostilities continued. Such an outcome defies common sense.

B. The Ability of Courts to Entertain Petitions for Writs of Habeas Corpus Made By Aliens Held Outside the Sovereign Territory of the United States

The Court, therefore, considers both cases as petitions for writs of habeas corpus on behalf of aliens detained by the United States at the military base at Guantanamo Bay, Cuba. In viewing both cases from this perspective, the Court concludes that the Supreme Court's ruling in *Johnson v. Eisentrager, 339 U.S. 763, 94 L. Ed. 1255, 70 S. Ct. 936 (1950),* and its progeny, are controlling and bars the Court's consideration of the merits of these two cases. The Court shall briefly provide an overview of the *Eisentrager* decision, discuss the distinction in *Eisentrager* between the rights of citizens and aliens, analyze whether *Eisentrager* applies only to enemy aliens, and lastly, discuss the meaning of the concept of "sovereign territory" as presented in *Eisentrager*.

1. *Johnson v. Eisentrager*

The *Eisentrager* case involved a petition for writs of habeas corpus filed by twenty-one German nationals in the United States District Court for the District of Columbia. *Eisentrager, 339 U.S. at 765.* The prisoners in *Eisentrager* had been captured in China for engaging in espionage against the United States following the surrender of Germany, but before the surrender of Japan, at the end of World War II. *Id. at 766.* Since the United States was at

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Accordingly, even if the Court did not treat the *Odah* case as a petition for writs of habeas corpus, Count III, brought pursuant to the Administrative Procedure Act, fails because the actions complained of by Plaintiffs are exempt pursuant to *5 U.S.C. § 701*(b)(1)(G). Additionally, as Plaintiffs have not set forth another basis for the government's waiver of its sovereign immunity outside the Administrative Procedure Act, Count II brought pursuant to the Alien Tort Statute would be subject to dismissal.

peace with Germany, the actions of the *Eisentrager* petitioners violated the laws of war. *Id.* Following a trial and conviction by a United States military commission sitting in China, with the express permission of the Chinese government, the prisoners were repatriated to Germany to serve their sentences at Landsberg Prison. *Id.* Their immediate custodian at Landsberg Prison was a United States Army officer under the Commanding General, Third United States Army, and the Commanding General, European Command. *Id.*

The district court dismissed the petition for want of jurisdiction. *Id. at 767.* An appellate panel reversed the decision of the district court and remanded the case for further proceedings. *See Eisentrager v. Forrestal, 84 U.S. App. D.C. 396, 174 F.2d 961 (D.C. Cir. 1949).* In an opinion by Judge E. Barrett Prettyman, the Court of Appeals for the District of Columbia Circuit held that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ." *174 F.2d at 963.*

A divided panel of the Supreme Court reversed the decision of the District of Columbia Circuit and affirmed the judgment of the district court. *Eisentrager, 339 U.S. at 791.* In finding that *no* court had jurisdiction to entertain the claims of the German nationals, the Supreme Court, in an opinion by Justice Robert Jackson, found that a court was unable to extend the writ of habeas corpus to aliens held outside the sovereign territory of the United States. *Id. at 778.*

2. The Critical Distinction Between Citizens and Aliens

Justice Jackson began his opinion by noting the legal differences between citizens and aliens, and between friendly aliens and enemy aliens. *Id. at 769.* Noting that citizenship

provides its own basis for jurisdiction, Justice Jackson observed that "citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar." *Id.* Such protections, Justice Jackson noted, also apply to an individual seeking a fair hearing on his or her claim to citizenship. *Id. 769-70* (citing *Chin Yow v. United States, 208 U.S. 8, 52 L. Ed. 369, 28 S. Ct. 201 (1908)).*

In the case of the alien, Justice Jackson wrote that "the alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Id.* at 770. For example, presence within the country provides an alien with certain rights that expand and become more secure as he or she declares an intent to become a citizen, culminating in the full panoply of rights afforded to the citizen upon the alien's naturalization. *Id.* In extending constitutional protections beyond the citizenry, Justice Jackson noted that the Supreme Court "has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id.* at 771. Justice Jackson's sentiment is borne out by the case law. Courts of the United States have exercised jurisdiction in cases involving individuals seeking to prove their citizenship, *Chin Yow, 208 U.S. at 13 (1908)* (habeas action permitted for one seeking admission to the country to assure a hearing on his claims to citizenship), or in situations where aliens held in a port of the United States sought entry into the country, *Nishimura Ekiu v. United States, 142 U.S. 651, 660, 35 L. Ed. 1146, 12 S. Ct. 336 (1892)* ("An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful."). In the cases at bar it is undisputed that the individuals held at Guantanamo Bay do not seek to become citizens. Nor have Petitioners or Plaintiffs suggested that they have ever been to

the United States or have any desire to enter the country. Petitioners and Plaintiffs do not fall into any of the categories of cases where the courts have entertained the claims of individuals seeking access to the country.

3. Does the *Eisentrager* Opinion Apply Only to "Enemy" Aliens?

Justice Jackson continued his analysis in *Eisentrager* by noting that enemy aliens captured incident to war do not have even a qualified access to the courts of the United States as compared to an alien who has lawful residence within the United States. *Eisentrager, 339 U.S. at 776* ("The nonresident enemy alien, especially one who has remained in the service of the enemy, does not have . . . this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy."); *id.* (quoting *Clarke v. Morey, 10 Johns. 69, 72 (N.Y. Sup. Ct. 1813)* ("A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity.")). Petitioners in *Rasul* and Plaintiffs in *Odah* argue that the determination by the military commission in China that the petitioners in *Eisentrager* were enemy aliens is fatal to the government's reliance on *Eisentrager*. Pet'rs Mem. in Opp'n to Resp'ts Mot. to Dismiss ("Pet'rs Opp'n") at 12; Pls.' Opp'n at 6-7. Insisting that no determination has been made about the aliens presently held by the government at Guantanamo Bay, Plaintiffs and Petitioners argue that the holding in *Eisentrager* is inapplicable to the instant cases.

To the contrary, the Supreme Court's conclusion in *Eisentrager*, that the district court was without jurisdiction to consider the petition for writs of habeas corpus on behalf of the twenty-one German nationals, did not hinge on the fact that the petitioners were enemy aliens, but on the fact that

they were aliens outside territory over which the United States was sovereign. The Supreme Court held:

> We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the sences of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.

Id. at 777-78. In fact, the Supreme Court has consistently taken the position that *Eisentrager* does not apply only to those aliens deemed to be "enemies" by a competent tribunal. *See Zadvydas v. Davis, 533 U.S. 678, 693, 150 L. Ed. 2d 653, 121 S. Ct. 2491 (2001)* (Breyer, J.); *United States v. Verdugo-Urquidez, 494 U.S. 259, 270, 108 L. Ed. 2d 222, 110 S. Ct. 1056 (1990)* (Rehnquist, C.J.). These later Supreme Court cases reinforce the conclusion that there is no meaningful distinction between the cases at bar and the *Eisentrager* decision on the mere basis that the petitioners in *Eisentrager* had been found by a military commission to be "enemy" aliens.[12]

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[12] The government has encouraged this Court to take "judicial notice" that these individuals are "enemy combatants." Tr. 9-10. In reviewing this case, the Court has taken the allegations in the Amended Petition and Amended Complaint as true as required by Rule 12(b)(1). Petitioners and Plaintiffs allege that the individuals held at Guantanamo Bay were initially taken into custody and detained in Afghanistan and Pakistan where military hostilities were in progress. Am. Pet. PP 22-24; Am. Compl. P 16. David Hicks, who had joined the Taliban, *see supra* note 6, arguably may be appropriately considered an "enemy combatant." The paucity, ambiguity, and contradictory information provided by the Amended Petition and the Amended Complaint about Petitioners Rasul and Iqbal and the twelve Kuwaiti Plaintiffs held at the military base at Guantanamo Bay prevents the Court from likewise concluding that these individuals were engaged in hostilities against the United States, or were instead participating in the benign activities suggested in the pleadings. While another court with apparently the same factual record has labeled, without explanation, the individuals held at Guantanamo Bay "enemy combatants," *Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036, 1048 (C.D. Cal. 2002)*, this Court on the record before it, declines to take that step because taking judicial notice of a fact requires that the fact be "not subject to reasonable dispute." Fed. R. Evid. 201.

In *Zadvydas*, the Court cited *Eisentrager* for the proposition that "it is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas, 533 U.S. at 693* (discussing also that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"). In *Verdugo-Urquidez*, the Court quoted a passage from *Eisentrager* for the proposition that the Supreme Court has emphatically rejected "extraterritorial application of the Fifth Amendment." *Verdugo-Urquidez, 494 U.S. at 269.* The Court of Appeals for the District of Columbia Circuit has taken a similarly broad view of *Eisentrager. Harbury v. Deutch, 344 U.S. App. D.C. 68, 233 F.3d 596, 605 (D.C. Cir. 2000), rev'd on other grounds sub nom. Christopher v. Harbury, 536 U.S. 403, 153 L. Ed. 2d 413, 122 S. Ct. 2179 (2002)* (observing that the Supreme Court's citation to *Eisentrager* in *Verdugo-Urquidez* was binding, and expressing its view that extraterritorial application of the Fifth Amendment was not available for aliens).

If there exists any doubt as to the sweeping nature of the holding in *Eisentrager*, the dissent in that opinion clearly crystallizes the extent of the decision. Justice Douglas, writing for himself and two other Justices, stated:

> If the [majority's] opinion thus means, and it apparently does, that these petitioners are deprived of the privilege of habeas corpus solely because they were convicted and imprisoned overseas, the Court is adopting a broad and dangerous principle. . . . The Court's opinion inescapably denies courts power to afford the least bit of protection for any alien who is subject to our occupation government abroad, even if he is neither enemy nor belligerent and even after peace is officially declared.

Eisentrager, 339 U.S. at 795-96 (Douglas, J., dissenting). Thus, even Justice Douglas noted that according to the majority's opinion in *Eisentrager*, the Great Writ had no extraterritorial application to aliens.

Accordingly, the Court finds that *Eisentrager* is applicable to the aliens in these cases, who are held at Guantanamo Bay, even in the absence of a determination by a military commission that they are "enemies."[13] While it is true that the petitioners in *Eisentrager* had already been convicted by a military commission, *id. at 766,* the *Eisentrager* Court did not base its decision on that distinction. Rather, *Eisentrager* broadly applies to prevent aliens detained outside the sovereign territory of the United States from invoking a petition for a writ of habeas corpus.

In sum, the *Eisentrager* decision establishes a two-dimensional paradigm for determining the rights of an individual under the habeas laws. If an individual is a citizen

[13] The United States confronts an untraditional war that presents unique challenges in identifying a nebulous enemy. In earlier times when the United States was at war, discerning "the enemy" was far easier than today. "In war 'every individual of the one nation must acknowledge every individual of the other nation as his own enemy.'" *Eisentrager 339 U.S. at 772* (quoting *The Rapid, 8 Cranch 155, 161 (1814)*). The two cases at bar contain nationals from three friendly countries at peace with the United States, demonstrating the difficulty in determining who is the "enemy."

or falls within a narrow class of individuals who are akin to citizens, i.e. those persons seeking to prove their citizenship and those aliens detained at the nation's ports, courts have focused on situs and have not been as concerned with the status of the individual. However, if the individual is an alien without any connection to the United States, courts have generally focused on the location of the alien seeking to invoke the jurisdiction of the courts of the United States. If an alien is outside the country's sovereign territory, then courts have generally concluded that the alien is not permitted access to the courts of the United States to enforce the Constitution. Given that *Eisentrager* applies to the aliens presently detained at the military base at Guantanamo Bay, the only question remaining for the Court's resolution is whether Guantanamo Bay, Cuba is part of the sovereign territory of the United States.

4. Is Guantanamo Bay Part of the Sovereign Territory of the United States?

The Court in *Eisentrager* discusses the territory of the United States in terms of sovereignty. *Id.* at 778 ("for these prisoners at no relevant time were within any territory over which the United States is sovereign"). It is undisputed, even by the parties, that Guantanamo Bay is not part of the sovereign territory of the United States.[14] Thus, the only

[14] The United States occupies Guantanamo Bay under a lease entered into with the Cuban government in 1903. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. 418. The lease provides:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over [the military base at Guantanamo Bay], on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and

question remaining for resolution is whether this fact alone is an absolute bar to these suits, or whether aliens on a United States military base situated in a foreign country are considered to be within the territorial jurisdiction of the United States, under a *de facto* theory of sovereignty.

Petitioners and Plaintiffs assert that the United States has *de facto* sovereignty over the military base at Guantanamo Bay, and that this provides the Court with the basis needed to assert jurisdiction. Pet'rs Opp'n at 21; Pls.' Opp'n at 11. In other words, Petitioners and Plaintiffs argue that even if the United States does not have *de jure* sovereignty over the military facility at Guantanamo Bay, it maintains *de facto* sovereignty due to the unique nature of the control and jurisdiction the United States exercises over this military base. According to Petitioners and Plaintiffs, if the United States has *de facto* sovereignty over the military facility at Guantanamo Bay, then *Eisentrager* is inapplicable to their cases and the Court is able to assume jurisdiction over their claims. However, the cases relied on by Petitioners and Plaintiffs to support their thesis are belied not only by *Eisentrager*, which never qualified its definition of sovereignty in such a manner, but also by the very case law relied on by Petitioners and Plaintiffs.

At oral argument, when asked for a case that supported the view that *de facto* sovereignty would suffice to provide the Court with jurisdiction, both Petitioners and Plaintiffs directed the Court to *Ralpho v. Bell, 186 U.S. App. D.C. 368, 569 F.2d 607 (D.C. Cir. 1977).* Tr. at 33, 62-63. The *Ralpho* case involves a claim brought under the Micronesian Claims Act of 1971, which was enacted by the United States

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> control over and within said areas with the right to acquire . . . for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

Id. As is clear from this agreement, the United States does not have sovereignty over the military base at Guantanamo Bay.

Congress to establish a fund to compensate Micronesians for losses incurred during the hostilities of World War II. *Ralpho, 569 F.2d at 611.* The plaintiff in that case, a citizen of Micronesia, argued that the Micronesian Claims Commission, established by the Act to adjudicate settlement claims, violated his due process rights by relying on secret evidence in deciding his claim. *Id.* at 615. While the United States did not have sovereignty over Micronesia, the District of Columbia Circuit found that the plaintiff was entitled to the protections of the due process clause. *Id.* at 618-19.

Petitioners and Plaintiffs have seized upon this case as an example of a court granting an alien due process rights in a geographic area where the United States was not sovereign. Petitioners and Plaintiffs contend that if the plaintiff in *Ralpho* was able to secure constitutional rights in an area where the United States was not sovereign, constitutional rights are arguably available to aliens located in places where the United States is the *de facto* sovereign. The problem for Petitioners and Plaintiffs is that *Ralpho* does not stand for the proposition that a court can grant constitutional rights over a geographical area where *de facto* sovereignty is present. Rather, *Ralpho* stands for a limited extension of the uncontested proposition that aliens residing in the sovereign territories of the United States are entitled to certain basic constitutional rights.

As the Court of Appeals explained in *Ralpho*, "that the United States is answerable to the United Nations for its treatment of the Micronesians does not give Congress greater leeway to disregard the fundamental rights and liberties of a people as much American subjects as those in other American territories." *Id.* After this observation, the *Ralpho* Court quoted the remarks of the United States Representative to the United Nations Security Council Meeting that considered whether to award trusteeship to the United States: "My government feels that it has a duty toward the peoples of the Trust Territory to govern them with no less consideration than it would govern any part of its sovereign

territory." *Id.* n.72 (internal citation omitted). Additionally, when the United States was appointed by the United Nations to administer Micronesia as a trust territory, no other nation had sovereignty over Micronesia, and the United States had "full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of [the trust] agreement." Trusteeship Agreement for the Former Japanese Mandated Islands Approved at the One Hundred and Twenty-Fourth Meeting of the Security Council, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, art. 3; *id.*, preamble (noting that "Japan, as a result of the Second World War, has ceased to exercise any authority in these islands").

As clearly set forth in the case, the *Ralpho* Court treated Micronesia as the equivalent of a United States territory, such as Puerto Rico or Guam. In fact, *Ralpho* relies solely on the cases establishing constitutional rights for persons living in the territories of the United States as support for the view that the plaintiff located in Micronesia was deserving of certain due process rights. *Ralpho, 569 F.2d at 619 n.70* (citing, *inter alia, Balzac v. Porto Rico, 258 U.S. 298, 313, 66 L. Ed. 627, 42 S. Ct. 343 (1922)).* The *Balzac* case, which predates *Eisentrager*, stands for the proposition that the limits of due process apply to the sovereign territories of the United States. *Balzac, 258 U.S. at 313; id at 312* ("The Constitution, however, contains grants of power, and limitations which in the nature of things are not always and everywhere applicable and the real issue in the Insular Cases was not whether the Constitution extended to the Philippines or [Puerto] Rico when we went there, but which ones of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.")[15]

[15] In *Harbury*, the Court of Appeals referred to *Balzac* as a situation where foreign nationals were under "de facto U.S. political control." *Harbury, 233 F.3d at 603.* This phrase does not imply that in situations where "*de facto* sovereignty" might arguably be present, constitutional rights are available to aliens. In making this statement, the Court of Appeals cited to two cases involving Puerto Rico, *Examining Bd. of Eng'rs., Architects & Surveyors v. Otero, 426 U.S. 572, 599 n.30, 49 L. Ed. 2d 65, 96 S. Ct. 2264 (1976)* and *Balzac, 258 U.S. at 312-13,* and another case involving a special court of the United States that was held in Berlin, *United States v. Tiede, 86 F.R.D. 227, 242-44 (U.S. Ct. Berlin 1979).* In the two cases involving Puerto Rico, it is undisputed that the United States had sovereignty over the territory. In the case involving the special court convened in Berlin, the court was a United States court convened in an occupation zone controlled by the United States. *Tiede, 86 F.R.D. at 244-45* ("The sole but novel question before the Court is whether friendly aliens, charged with civil offenses in a United States court in Berlin, under the unique circumstances of the continuing United States occupation of Berlin, have a right to a jury trial."). Accordingly, the fact that the panel in *Harbury* used the phrase "de facto U.S. political control" to describe a category of cases where constitutional rights were provided to non-citizens does not aid Petitioners and Plaintiffs. The cases relied upon by the Court of Appeals in *Harbury* for this statement do not support the view that where the United States has *de facto* sovereignty, courts of the United States have jurisdiction to entertain the claims of aliens.

Thus, the Court in *Ralpho* analogized the situation before it to those cases granting constitutional rights to the peoples of United States territories, even though the trust agreement with the United Nations did not provide for sovereignty over Micronesia. *Ralpho, 569 F.2d at 619 n.71.* The cases involving the territories of the United States, relied on by the *Ralpho* Court, are fundamentally different from the two cases presently before the Court. The military base at Guantanamo Bay, Cuba, is nothing remotely akin to a territory of the United States, where the United States provides certain rights to the inhabitants. Rather, the United States merely leases an area of land for use as a naval base. Accordingly, the Court is hard-pressed to adopt Petitioners' and Plaintiffs' view that the holding in *Ralpho* favors their claims.

In fact, another district court considering whether a *de facto* sovereignty test should be used to analyze claims occurring at the military base at Guantanamo Bay flatly rejected the idea. *Bird v. United States, 923 F. Supp. 338 (D. Conn. 1996).* In *Bird*, a plaintiff alleged a misdiagnosis of a

brain tumor at the United States Medical Facility at Guantanamo Bay. *Id. at 339.* Seeking to sue under the Federal Tort Claims Act ("FTCA"), the plaintiff sought to distinguish prior case law which held that injuries occurring on leased military bases were exempt from the FTCA under the "foreign country" exemption. In order to circumvent this case law, the plaintiff in *Bird* argued that the unique territorial status of the military base at Guantanamo Bay brought injuries occurring on its soil within the FTCA. *Id. at 340.* Rejecting the plaintiff's argument that the United States had *de facto* sovereignty over the military base at Guantanamo Bay, the court wrote, "because the 1903 Lease of Lands Agreement clearly establishes Cuba as the *de jure* sovereign over Guantanamo Bay, this Court need not speculate whether the United States is the *de facto* sovereign over the area." *Id. at 343.* While *Bird* dealt with the foreign country exemption to the FTCA, it expressly disavowed a *de facto* sovereignty test, when it was clear that Cuba was the *de jure* sovereign over Guantanamo Bay.

The *Bird* case is not the only court to reject a *de facto* sovereignty test for claims involving aliens located at the military base at Guantanamo Bay. *Cuban American Bar Ass'n, Inc. v. Christopher, 43 F.3d 1412 (11th Cir. 1995), cert. denied, 515 U.S. 1142 (1995).* The *Cuban American Bar Association* case involved Cuban and Haitian migrants held in "safe haven" at Guantanamo Bay after they left their respective countries and were intercepted in international waters by the United States Coast Guard. *Id. at 1417, 1419.* The Eleventh Circuit specifically addressed the question of whether migrants "outside the physical borders of the United States have any cognizable statutory or constitutional rights." *Id. at 1421.* In *Cuban American Bar Association*, the Eleventh Circuit held:

> The district court here erred in concluding that Guantanamo Bay was a "United States territory." We disagree that "control and jurisdiction" [as set forth in the lease between the United States and Cuba] is equivalent to sovereignty. . . . We again reject the argument that our leased military bases abroad which continue under the sovereignty of foreign nations, hostile or friendly, are "functionally equivalent" to being land borders or ports of entry of the United States or otherwise within the United States.

Id. at 1425 (internal citations omitted). Thus, *Cuban American Bar Association* stands for the proposition that the military base at Guantanamo Bay is not within the territorial jurisdiction of the United States simply because the United States exercises jurisdiction and control over that facility.

Plaintiffs seek to distinguish *Cuban American Bar Association* by citing a Second Circuit opinion that has been vacated as moot by the Supreme Court. Pls.' Opp'n at 12-13 (citing *Haitian Centers Council, Inc. v. McNary, 969 F.2d 1326 (2d Cir. 1992), vacated as moot sub nom. Sale v. Haitian Centers Council, Inc., 509 U.S. 918, 125 L. Ed. 2d 716, 113 S. Ct. 3028 (1993)* [hereinafter "*HCC*"]). Ordinarily the Court would give short shrift to a case that has been vacated by the Supreme Court and not issued by the District of Columbia Circuit. However, since Plaintiffs in their papers, emphasize the importance of the reasoning in this vacated decision, the Court considers it necessary to briefly address the case.

The Court determines that *HCC* is distinguishable on its facts. In *HCC*, migrants were housed at the military base on Guantanamo Bay and determinations were made by Immigration and Naturalization Service ("INS") officers regarding their status. *Id. at 1332-33.* Those migrants that an INS officer deemed to have a credible fear of political persecution were "screened in" and were to be brought to the United States to pursue asylum claims. Those who did not fit within this class were repatriated to Haiti. *Id.*

The crucial distinction in their rights as aliens is that the aliens in *HCC* had been given some form of process by the government of the United States. Once the United States made determinations that the migrants had a credible fear of political persecution and could claim asylum in the United States, these migrants became vested with a liberty interest that the government was unable to simply deny without due process of law. The situation in *HCC* is fundamentally different from the cases presently before the Court. The individuals held at Guantanamo Bay have no desire to enter the United States and no final decision as to their status has been made. At this stage of their detention, those held at Guantanamo Bay more closely approximate the migrants in *Cuban American Bar Association* than the migrants "screened in" for admission to the United States in *HCC*.[16]

VI. CONCLUSION

The Court concludes that the military base at Guantanamo Bay, Cuba is outside the sovereign territory of the United States. Given that under *Eisentrager*, writs of habeas corpus are not available to aliens held outside the sovereign territory of the United States, this Court does not have jurisdiction to entertain the claims made by Petitioners in *Rasul* or Plaintiffs in *Odah*. Of course, just as the *Eisentrager* Court did not hold "that these prisoners have no right which the military authorities are bound to respect," *Eisentrager, 339 U.S. at 789 n.14*, this opinion, too, should not be read as stating that these aliens do not have some form of rights under international law. Rather, the Court's decision

[16] While there is dicta in the *HCC* opinion which indicates a broader holding with regard to the constitutional rights of individuals detained at the military base on Guantanamo Bay, such dicta in *HCC* is not persuasive and not binding. *HCC, 969 F.2d at 1343*. The Supreme Court in *Eisentrager*, *Verdugo-Urquidez*, and *Zadvydas*, and the District of Columbia Circuit in *Harbury*, have all held that there is no extraterritorial application of the Fifth Amendment to aliens.

solely involves whether it has jurisdiction to consider the constitutional claims that are presented to the Court for resolution.

Petitioners and Plaintiffs argue that as long as the United States has *de facto* sovereignty over Guantanamo Bay, Fifth Amendment protections should apply. For this proposition, Petitioners and Plaintiffs rely on *Ralpho*, case that involves land so similar to United States territory that the District of Columbia Circuit extended constitutional protections to its inhabitants. Clearly, Guantanamo Bay does not fall into that category. The Court, therefore, rejects the holding in *Ralpho* as a basis for this Court to exercise jurisdiction over the claims made by Petitioners and Plaintiffs. Accordingly, both cases shall be dismissed for want of jurisdiction.

COLLEEN KOLLAR-KOTELLY
United States District Judge

ORDER
(July 30, 2002)

. For the reasons stated in the accompanying Memorandum Opinion, it is this 30 day of July, 2002, hereby

ORDERED that Respondents' Motion to Dismiss Petitioners' First Amended Petition for Writ of Habeas Corpus [# 26] filed in *Rasul v. Bush*, Civil Action No. 02-299, is GRANTED; it is further

ORDERED that Defendants' Motion to Dismiss Plaintiffs' Complaint and Plaintiffs' Motion for a Preliminary Injunction [# 15] filed in *Odah v. United States*, Civil Action No. 02-828, is GRANTED; it is further

ORDERED that *Rasul v. Bush*, 02cv299, and *Odah v. United States*, 02cv828, are DISMISSED WITH PREJUDICE.

SO ORDERED.

COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MAMDOUH HABIB, MAHA HABIB, as Next Friend of Mamdough Habib, *et al.*,
Petitioners,

v.

GEORGE WALKER BUSH, President of the United States, *et al.*,
Respondents.

Civil No. 02-1130 (CKK)

ORDER TO SHOW CAUSE
(July 30, 2002)

For the reasons set forth in its Memorandum Opinion issued July 30, 2002, in Rasul v. Bush, Civil Action No. 02-299, and Odah v. United States, Civil Action No. 02-828, dismissing those actions, the Court determines that "it appears from the application that the applicant or person detained is not entitled [to the writ]." 28 U.S.C. §2243. Accordingly, it is this 30th day or July, 2002, hereby

ORDERED that Petitioners shall have until August 7, 2002, to submit a notice to the Court as to why the Petition for Writ of Habeas Corpus should not be dismissed with prejudice; it is further

ORDERED that if the Court does not receive a response from Petitioners by August 7, 2002, it will dismiss the Petition for Writ of Habeas Corpus with prejudice.

SO ORDERED.

COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX E

United States Constitution

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX F

United States Code

28 U.S.C. §2241, which provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.
>
> * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless –
>
> 1. He is in custody under or by color of the authority of the United States....; or
>
> * * *
>
> 3. He is in custody in violation of the Constitution or laws or treaties of the United States....

APPENDIX G

GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF AUGUST 12, 1949

RESERVATIONS MADE AT THE TIME OF SIGNATURE OF THE GENEVA CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS OF AUGUST 12, 1949

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS the Geneva Convention relative to the Treatment of Prisoners of War was open for signature from August 12, 1949 until February 12, 1950, and during that period was signed on behalf of the United States of America and sixty other States;

WHEREAS the text of the said Convention, in the English and French languages, as certified by the Swiss Federal Council, is word for word as follows:

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of revising the Convention concluded at Geneva on July 27, 1929, relative to the Treatment of Prisoners of War, have agreed as follows:

PART I

GENERAL PROVISIONS

***

ARTICLE 5

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

APPENDIX H

Army Regulation 190-8
OPNAVINST 3461.6
AFJI 31-304
MCO 3461.1

Military Police

Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees

Headquarters
Departments of the Army,
the Navy, the Air Force,
and the Marine Corps
Washington, DC
1 October 1997

UNCLASSIFIED

***

1-6. Tribunals

a. In accordance with Article 5, GPW, if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, GPW, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

b. A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in

hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.

c. A competent tribunal shall be composed of three commissioned officers, one of whom must be of a field grade. The senior officer shall serve as President of the Tribunal. Another non-voting officer, preferably an officer in the Judge Advocate General Corps, shall serve as the recorder.

d. The convening authority shall be a commander exercising general courts-martial convening authority.

e. Procedures.

(1) Members of the Tribunal and the recorder shall be sworn. The recorder shall be sworn first by the President of the Tribunal. The recorder will then administer the oath to all voting members of the Tribunal to include the President.

(2) A written record shall be made of proceedings.

(3) Proceedings shall be open except for deliberation and voting by the members and testimony or other matters which would compromise security if held in the open.

(6) Persons whose status is to be determined shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. Witnesses shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In these cases, written statements, preferably sworn, may be submitted and considered as evidence.

(7) Persons whose status is to be determined have a

right to testify or otherwise address the Tribunal.

(8) Persons whose status is to be determined may not be compelled to testify before the Tribunal.

(9) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine the status of the subject of the proceeding in closed session by majority vote. Preponderance of evidence shall be the standard used in reaching this determination.

(10) A written report of the tribunal decision is completed in each case. Possible board determinations are:

(a) EPW.

(b) Recommended RP, entitled to EPW protections, who should be considered for certification as a medical, religious, or volunteer aid society RP.

(c) Innocent civilian who should be immediately returned to his home or released.

(d) Civilian Internee who for reasons of operational security, or probable cause incident to criminal investigation, should be detained.

(f) The recorder shall prepare the record of the Tribunal within three work days of the announcement of the tribunal's decision. The record will then be forwarded to the first Staff Judge Advocate in the internment facility's chain of command.

(g) Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to

determine what acts they have committed and what penalty should be imposed. The record of every Tribunal proceeding resulting in a determination denying EPW status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

APPENDIX I

STATEMENT OF HIGH COMMISSIONER FOR HUMAN RIGHTS ON DETENTION OF TALIBAN AND AL QAIDA PRISONERS AT US BASE IN GUANTANAMO BAY, CUBA
16.01.02

The following statement was issued today by United Nations High Commissioner for Human Rights Mary Robinson:

According to recent reports, 30 Taliban and At Qaida prisoners from Afghanistan arrived at the United States Naval Base in Guantanamo Bay, Cuba, on 14 January, 2002, to join a first group of 20 prisoners transferred from Afghanistan starting on 11 January. The reports include allegations about the manner in which the prisoners were transported and the conditions in which they are being detained.

Detailed information on these specific allegations is not yet available. I am aware that there are a number of legal issues and these are under active consideration by the US authorities. I am also aware that the International Committee of the Red Cross will have access to the prisoners and that there will be consular access.

It is appropriate to recall that there are international legal obligations that should be respected. In particular, I would like to recall that:

- All persons detained in this context are entitled to the protection of international human rights law and humanitarian law, in particular the relevant provisions of the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Conventions of 1949.

- The legal status of the detainees, and their entitlement to prisoner-of-war (POW) status, if disputed, must be determined by a competent tribunal, in accordance with the provisions of Article 5 of the Third Geneva Convention.

- All detainees must at all times be treated humanely, consistent with the provisions of the ICCPR and the Third Geneva Convention.

- Any possible trials should be guided by the principles of fair trial, including the presumption of innocence, provided for in the ICCPR and the Third Geneva Convention.

APPENDIX J

III. LEGAL OPINION REGARDING THE DEPRIVATION OF LIBERTY OF PERSONS DETAINED IN GUANTANAMO BAY

61. The Working Group has received many communications alleging the arbitrary character of detention measures applied in the United States as part of its investigations into the terrorist acts of 11 September 2001. These communications from the United States may be divided into two categories, the first covering persons detained in prisons on United States territory, and the second persons detained at the Naval Base of Guantanamo Bay adapted as a detention centre.

62. The Chairman-Rapporteur of the Working Group sent a letter dated 22 January 2002 to the Permanent Representative of the United States of America to the United Nations Office at Geneva, asking his Government for an invitation to visit the country in order to examine in situ the legal aspects of the question. The Working Group would take into consideration the provisions of articles 4 and 15, paragraph 2, of the International Covenant on Civil and Political Rights in order to be as rigorous and objective as possible.

63. As this letter remained unanswered, the Chairman-Rapporteur sent a second letter on 25 October 2002, requesting the following information concerning the detainees in Guantanamo Bay:

(a) How many persons are currently being detained in Guantanamo Bay?

(b) When did the first detainees arrive?

(c) Were the detainees informed of any charges and, if so, by what authority were they charged and under what legal proceedings?

(d) Is legal counsel available to the detainees and, if so, are they freely chosen or imposed automatically?

(e) Are detainees allowed to meet with their legal counsel and, if so, are the interviews confidential?

(f) Are detainees brought to a representative of the prosecution and, if so, within what period of time?

(g) Do detainees ultimately appear before a court and, if so, within what period of time?

64. As this second letter also remained unanswered, the Working Group gave its views in the light of the following elements of appreciation:

Category I (persons detained on United States territory). After considering the two cases before it, the Working Group, with regard to this category, arrived at the following position of principle in its Opinion No. 21/2002 (E/CN.4/2003/8/Add. 1): "The Working Group considers that Mr. X and Mr. Y have been detained for more than 14 months, apparently in solitary confinement, without having been officially informed of any charge, without being able to communicate with their families and without a court being asked to rule on the lawfulness of their detention." This situation is such as to confer an arbitrary character on their detention, with regard to articles 9 and 14 of the International Covenant on Civil and Political Rights, which guarantee, respectively, the right to a review of the lawfulness of detention by a competent judicial authority and the right to a fair trial.

Category II (persons detained at Guantanamo Bay). Before giving an opinion as to whether the detention of persons in this category was arbitrary or not, the Working Group determined the relevant legal framework, namely, the third Geneva Convention (relative to the treatment of prisoners of war), and the International Covenant on Civil and Political Rights, to both of which the United States are a party.

With respect to the third Geneva Convention. The Working Group began by noting the interpretation given by the American authorities, whereby these belligerents belonged to the sui generis category known as "enemy combatants" and that as such "they are not covered by the Geneva Convention and are not entitled to prisoner-of-war (POW) status under treaty" (statement made by the United States Press Secretary on 2 February 2002).

Besides the fact that this interpretation is open to debate, the Working Group recalls that the authority which is competent to determine prisoner-of-war status is not the executive power but the judicial power, in conformity with the provisions of article 5, paragraph 2, of the third Geneva Convention, which states that: "Should any doubt arise as to whether persons [...] belong to any other categories [of prisoners of war] enumerated in article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal" of the detaining power.

The United States court, however, dealing with the case (District Court for the District of Columbia) declared itself incompetent ratione loci, on the grounds that, since the territory of Guantanamo Bay was governed by an agreement concluded in 1903 between the United States and Cuba, the detention centre could not be considered as being on American soil.

The Working Group believes that it is worth recalling in this respect that, by letter of 14 September 1995, the United States authorities, agreeing to a request by the Working Group, had invited the Group to visit Haitian migrants and asylum-seekers detained at the Guantanamo Naval Base. The visit had finally had to be postponed indefinitely, following a decision, in 1996, by a United States court (District Court of the Eastern District of New York), which, after declaring itself competent, had ordered the release of the detainees. The Working Group suggested that this precedent should be taken into consideration in the debate taking place regarding the applicability of the above-mentioned article 5, paragraph 2, of the third Geneva Convention.

The Working Group concludes from the above that, so long as a "competent tribunal" in the meaning of the above-mentioned paragraph 2 has not issued a ruling on the contested issue, detainees enjoy "the protection of the ... Convention", as provided in paragraph 2, whence it may be argued that they enjoy firstly the protection afforded by its article 13 ("Prisoners of war must at all times be humanely treated"), and secondly the right to have the lawfulness of their detention reviewed and the right to a fair trial provided under articles 105 and 106 of that Convention (notification of charges, assistance of counsel, interpretation, etc.), so that the absence of such rights may render the detention of the prisoners arbitrary.

With respect to the International Covenant on Civil and Political Rights: Since the United States are party to the Covenant, in the case where the benefit of prisoner-of-war status should not be recognized by a competent tribunal, the situation of detainees would be governed by the relevant provisions of the Covenant and in particular by articles 9 and 14 thereof, the first of which guarantees that the lawfulness of a detention shall be reviewed by a competent court, and the second of which guarantees the right to a fair trial.

The need to combat terrorism undoubtedly requires imposing special restrictions on certain rights, including those concerning detention and fair trial. Such restrictions are in fact provided under article 4 of the Covenant ("In time of public emergency which threatens the life of the nation"), provided that, as the Human Rights Committee recalls in its General Comment No. 29, the notification procedure stipulated in paragraph 3 has been respected, whereby "Any State party [...] availing itself of the right of degrogation shall immediately inform the other States parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuates." This has not so far been the case with the United States.

The Working Group therefore considers that, while it is not competent to comment on whether the status of prisoner of war applies to the persons currently detained in Guantanamo Bay, it does remain within its mandate in considering whether the absense of minimum guarantees provided under articles 9 and 14 of the Covenant may confer on the detention an arbitrary character, all the more so if the Government concerned has failed to provide the information called for in article 4, paragraph 3, of the Covenant.

In other words, so long as a "competent tribunal" has not declared whether the status of prisoner of war may be considered applicable or not, the persons detained in Guantanamo Bay provisionally enjoy the guarantees stipulated in articles 105 and 106 of the third Geneva Convention.

On the other hand, should such a court issue a ruling on the matter:

- Either it rules in favour of a prisoner-of-war status and the persons concerned are definitely entitled to the guarantees provided by the third Geneva Convention:

- Or it invalidates the prisoner-of-war status, in which case the above-mentioned guarantees of the Covenant)under articles 9 and 14) take over from those of articles 105 and 106 of the third Geneva Convention, which no longer apply.

In conclusion, the Working Group recalls that, in its decision of 12 March 2002, the Inter-American Court of Human Rights requested that the United States take urgent measures to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal.